SUPREME COURT, U. S.

APR 17 1970

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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 97

RALPH PICCIRILLO,

Petitioner,

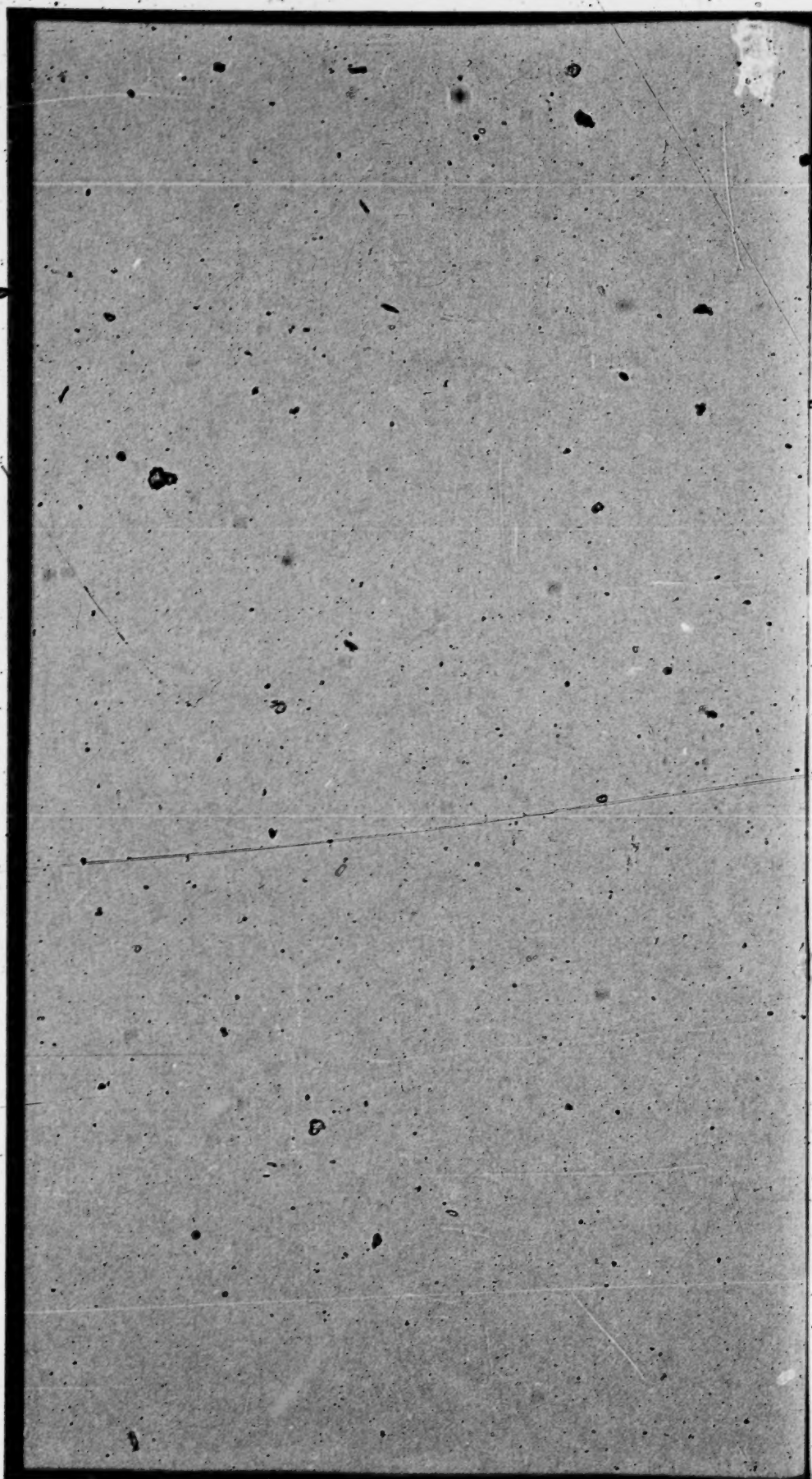
—v.—

NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF NEW YORK

PETITION FOR WRIT OF CERTIORARI FILED JULY 19, 1969

CERTIORARI GRANTED FEBRUARY 27, 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1249

RALPH PICCIRILLO,

Petitioner,

—v.—

NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF NEW YORK

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[fol. 2] IN THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

93/1965

Investigation into the assault on JACK GRAHAM, and the conspiracies arising therefrom.

MINUTES OF MARCH 48, 1965

Appearances:

AARON E. KOOTA, ESQ.
District Attorney

By:

EDWARD A. PANZORELLA, ESQ.
Assistant District Attorney

EDWARD MINTZER
Grand Jury Reporter

* * * * *

[fol. 5] ANTHONY LA BELLO, residing at Sing Sing prison, was duly sworn as a witness and testified as follows:

BY MR. PANZORELLA:

Q Mr. LaBello, this grand jury is here for the purpose of investigating an assault committed on Jack Graham on March 19, 1964 and investigating any and all conspiracies that might be connected with the assault on Jack Graham. You were indicted and convicted on your own plea of guilty to the crime of attempted assault in the second degree before Justice Barshay on September 9, 1964, were you not?

A I refuse to answer on the grounds that it might incriminate me.

Q Mr. LaBello, Section 2447 of the Penal Law provides for witness's immunity. That says, that section of law says, that a duly constituted grand jury such as this grand jury has the right to confer immunity upon

a witness before it in a proceeding. In the usual way in the sense of the word, your case is slightly different. You were convicted of that crime by your own plea of guilty and you were sentenced by Judge Barshay and [fol. 6] you are now serving the sentence for the crime. You cannot be prosecuted again for that crime. This investigation deals with what you already confessed and admitted to the Judge that you did. You don't need immunity. However, I'm going to have this grand jury vote whether or not they will confer immunity for the testimony that you will give this grand jury and that means this: You have been already sworn as a witness. Anything that you testify to in this grand jury, any legal evidence that you give pursuant to any question that I put to you in this grand jury for the answer you cannot be prosecuted. Therefore, because this grand jury when it votes will confer immunity upon you for prosecution of your answers. Do you understand what I'm talking about?

A Yes. I'd like to see my attorney.

Q I * * * will have this grand jury vote whether or not they give you immunity. I will then put a question to you and from thereon if you refuse to testify I will take you before Mr. Justice Shapiro who I believe is sitting in Part 1 and ask you be held in contempt of this grand jury for refusing to answer legal and proper questions. Now, will you step outside a minute, [fol. 7] please.

(Whereupon, the witness, Anthony LaBello, Mr. Panzorella and the reporter left the room.)

(Upon being summoned to return the witness took the stand and testified as follows:)

BY MR. PANZORELLA:

Q Mr. Foreman, have you and the grand jury voted on the question of the granting of immunity to this witness pursuant to Section 2447 of the Penal Law?

THE FOREMAN:

A Yes.

MR. PANZORELLA:

Q How did the grand jury vote?

THE FOREMAN:

A We voted to grant this man immunity.

BY MR. PANZORELLA:

Q Now Mr. witness, did you understand the Foreman of the grand jury?

A I understood him, yes.

Q Do you understand that you cannot be prosecuted for the answers you will give to any questions put to you in this grand jury? Do you understand that?

[fol. 8] A Yes.

Q I therefore ask you again sir, did you plead guilty to the crime of attempted assault in the second degree before Mr. Justice Barshay in the Supreme Court of Kings County and in that plea admit that you together with another assaulted Jack Graham with a weapon?

A Mr. Panzorella, I'm granted immunity, any paper supposed to be signed any way?

Q No, it's in the grand jury record.

A Yes.

Q Is that the answer to the question, sir?

A You want to put it to me again?

Q Will you repeat the question again Mr. Reporter?

(Whereupon the last question was read back by the reporter.)

Q What is your answer Mr. Witness?

A Yes.

Q Mr. Justice Barshay sentenced you after your plea of guilty?

A Yes.

Q How much of a prison sentence did you get?

[fol. 9] A One year three months, 2½.

Q To two years six months?

A Yes.

Q In Sing Sing Prison?
A Yes.
Q That is where you are presently confined, is that correct?
A Yes.
Q Now, sir, do you recall March 19, 1964? Do you recall that date?
A No.
Q Do you recall that on that date you were arrested for the assault of Jack Graham?
A Oh, the date I didn't remember but I was arrested.
Q On that day, at about 10 o'clock, in the morning together with someone in Brooklyn?
A Yes.
Q Was that other person Ralph Piccirillo?
A Yes.
Q And were you in the vicinity of Blake Avenue and Stone Avenue in the County of Kings, State of New York?
A Yes.
[fol. 10] Q Is that location, Blake Avenue and Stone Avenue, a parking lot in connection with a housing development?
A Yes, sir.
Q And at that time were you armed with a weapon?
A Yes.
Q What was it that you had?
A A tire iron.
Q Where had you obtained the tire iron?
A Someone gave it to me.
Q When?
A That day, that morning.
Q When?
A Right over there, I don't know if it's Blake.
Q Who was it that gave it to you?
A Some fellow that called himself Tony.
Q Had you met this Tony before you met him that morning? How did you meet him?
A I wasn't working. I was having coffee in a cafeteria down on Canal Street.
Q Yes?

A I was having coffee. There was no work that day [fol. 11] and this man come up to me, he sat down, started talking. "You're out of work?" "Yes, I'm out of work today," He says, "You're out of work often?" I said, 'Well, on bad days, not many trucks come down." He said, "Would you like to make a few dollars?" So I said, "Yeah, I'm willing to work." So he explained it to me. That was it. He promised me money.

Q Now, I want to advise you this at this time that this grand jury conferred immunity on you for the testimony that you give here that may connect you with the commission of a crime but the grand jury cannot confer immunity on you for any perjury that you comit. In other words, if the testimony that you give before this grand jury is a lie, you can be prosecuted for the lie because neither this grand jury nor any court can forsee when you may lie or comit perjury when you answer any question. Now, do you understand me?

A Yes.

Q Now, where did you live? What was your home address at the time that we are talking about, March 19, 1964?

A 846 43rd Street, Brooklyn.

[fol. 12] Q Where did Ralph Piccirillo live?

A He lived in Brooklyn, I don't recall the address.

Q Had you known Ralph Piccirillo for some length of time?

A Yes.

Q How long?

A Quite a few years, I don't remember. We went to school and I know him from the neighborhood.

Q Isn't it the truth that Ralph Piccirillo was living at 13 Manhattan Avenue in Union City, New Jersey at this time?

A I wouldn't know. I know he lives in Brooklyn.

Q Where did you meet Ralph Piccirrillo on the morning of March 19, 1964?

A Holland Cafeteria.

Q Where is that located?

A On Canal Street Between Hudson and Varret.

Q What time in the morning was it that you met, if it was the morning?

A It was about 6:30 in the morning.

Q What were you doing there?

A It's a place where we go for work.

[fol. 13] Q In the cafeteria?

A They disptach the trucks from there through a telephone. See, trucks come in from upstate and they come over there and the steward of the job dispatches them from there.

Q Who dispatches?

A Who?

Q Who?

A A steward of the job. It's Charles Bannanti (phonetic spelling).

Q Bannanti?

A Bannanti.

Q You are a union member?

A Yes.

Q What local?

A 560.

Q Of what?

A Teamsters Union.

Q In other words, you are saying that you shape up at this restaurant?

A Well, I don't actually shape up there. I work in Jersey City for Service Trucking. I used to work a few [fol. 14] days with Rufello (phonetic spelling) Trucking. These two jobs. When one is slow, like I go over to Jersey. If they need men in Jersey, the guys from New York go to Jersey; if they need men in New York, the same thing.

Q On this morning, you are in New York?

A Yes.

Q You say you met there in that Hudson Cafeteria?

A Holland.

Q Holland Cafeteria a man by the name of Tony?

A Yes.

Q Was he a union member?

A I don't know. I had never seen him.

Q Never saw him before?

A I might have seen him once in the place or twice but I don't know what he was doing.
Q Did you see him shape up on the job too?
A No, he never shaped up.
Q Never shaped up on the job?
A No.
Q Did you ever see him in New Jersey?
A No.
Q Can you describe Tony for us?
[fol. 15] A A little bigger than me.
Q How tall?
A I think I am 5'5". I'd say about 5'8", 5'8½. High forehead.
Q Sir?
A High forehead.
Q What color hair?
A Black hair.
Q Wavy or straight?
A I couldn't tell you if it was straight or wavy.
Q Why can't you tell us?
A I don't recall.
Q Was he wearing a hat?
A No.
Q How was he dressed?
A He had a dark coat on, dark clothes.
Q Full overcoat?
A Yeah, sort of an iridescent raincoat.
Q What was the color of his skin?
A White. What would you call it?
Q Was he dark skinned, light skinned, fair, ruddy?
A I would say fair.
[fol. 16] Q Did he have a mustache?
A No.
Q Color of his eyes?
A I don't recall.
Q How about his ears, were they close to his head or away from his head?
A I wouldn't know.
Q Any scars on his face?
A No.

Q What was the shape of his nose?
A I don't know how to put it, the shape.
Q Was it a big nose or a little nose?
A Well, it was no big nose?
Q Was it a little nose?
A I don't know what you mean, "Was it a little nose?"
Q Was it broad?
A No, it wasn't broad.
Q Was it thin?
A No, it wasn't thin.
Q If it wasn't thin, it was what, it wasn't broad?
A It was a regular nose.
[fol. 17] Q Medium? Any hook in the nose?
A No.
Q Did the nose look as though it had been broken?
A No.
Q You are sure about this?
A Yeah.
Q Did he wear a beard?
A No.
Q Clean shaven?
A Yeah, average.
Q Was he clean shaven or did he need a shave?
A He had a little hair on his face. He didn't really need a shave. He can do without it.
Q Was he young or old?
A I'd say in the thirties, thirty-five, thirty-six.
Q How many pounds would you say he weighed, about?
A I don't know, about 190, 180.
Q He was heavy set?
A Well, he was like a little broad or something, good build.
[fol. 18] Q What about his hands? Did you see his hands?
A Yes, I saw his hands.
Q Were they big hands or little hands?
A Well, they weren't little, they were big.
Q They were big?
A They were big, they weren't little.

Q Were they clean or dirty?
A They were clean.
Q Did you shake hands with him?
A No.
Q Did he have calluses on his hands?
A That I wouldn't know.
Q Were his hands hairy or not?
A Well, his hands weren't hairy, not that I recall. I don't think so.
Q Are your hands hairy?
A No.
Q Were they like your hands?
A Yeah, I got no hair at all on my hands, might have been a little bit.
Q How long did you talk to Tony?
A I guess for about an hour or so.
[fol. 19] Q Did he speak with an accent?
A No.
Q Was he an educated type of fellow?
A No.
Q How did he talk?
A What do you mean? I don't know what you mean?
Q I withdraw the question. Did he have a high voice, a medium voice, or a low voice?
A All we were doing was talking low.
Q Did he talk like you?
A Yes.
Q Or did he raise his voice high more toward the girlish type of voice?
A No.
Q Or did he have a very low voice, lower than yours in tone?
A I wouldn't know, I don't recall.
Q How about his lips? Were they thick or thin?
A They weren't thin.
Q What were they?
A They weren't big or anything, they were just normal.
Q Normal?
[fol. 20] A Normal.
Q Did he have a big mouth or small mouth?
A It would be normal, I don't know.

Q What was the conversation between you and Tony?
A He asked if I wanted to make some money. So I said I would like it. So he explained the situation.
Q Tell us. Don't say he explained the situation, what situation? Tell us the whole story as you remember it.
A He says that he wanted to make some money so I said, "Yes."
Q How much?
A $50.
Q $50 for you or $50 complete?
A $50 for me.
Q And $50 for Piccirillo?
A Yes.
Q So that's a hundred dollars?
A Yes.
Q And you said sure?
A I said sure.
[fol. 21] Q What did Piccirillo say?
A The same.
Q Did you ask what we have to do for this or what do I have to do for this?
A I asked, yes.
Q What did you say?
A What do you mean, what did I say?
Q What did you say to the man when he said to you do you want to make some money. You said yes?
A Yes.
Q Did you say well, how much money am I going to make?
A Yes.
Q You asked him that?
A Yes.
Q What did you say? Repeat your own words.
A How much money will I make?
Q And he told you what?
A $50.
Q Then what else did you say to him? Did you ask him what do I have to do to earn $50?
A Yes, I asked him that?
[fol. 22] Q How did you put it? What were your words?

A I asked him what do I have to do?

Q I'm not putting words in your mouth, am I? I am not testifying here you are the one that is testifying. Tell us the whole thing. You tell us everything, all the words that you remember that he said, that you said, that Piccirillo said. Tell us the whole story as though it was happening right here and now, tell us.

A He asked if I wanted to make some money. I said yes. I asked how much. He says $50. So I ask him, you know, what do I got to do? So, he told me, well, first he would take us over into Brooklyn and then he explained it.

Q Wait a minute. You are going onto something new. We are still in the restaurant in New York. What happened in the restaurant in New York? That's what we want to know first before you take us to Brooklyn.

A Well, he didn't actually say anything in the restaurant. He says—we were just talking for a little while there.

Q About what?

A I don't recall about what. Then he started to get on with hitting somebody.

[fol. 23] Q This is in New York?

A What?

Q In New York this went on, in the restaurant.

A Yes.

Q How did he say it?

A He says I would like to—you know, he says I want you to hit somebody for me.

Q What did you say?

A I said, what do you mean? And so he says no, not hurt anybody real bad, just hit somebody. You know.

Q What do you mean, "hit"? You know this grand jury has been sitting a long time and the word "hit" to them, what they have been hearing is that when you hit somebody you kill them. That's the usual expression. You tell us, it's your story.

A He said to hit somebody. I don't recall any other words in between.

Q How were you going to hit him?

A With a tire iron just in the legs.

Q Did he say why?

A I asked why and—you know, he just didn't answer. He said never mind.

Q You agreed?

[fol. 24] A Yes.

Q For $50?

A Yes.

Q Did you collect your money in advance?

A No.

Q You had a conversation about when you were going to get paid?

A That came after. He says after it happened.

Q He told you this?

A Yes.

Q What did Piccirillo say?

A I believe he went along with me.

Q You believe? Did you hear him say anything?

A I don't recall anything.

Q Did you talk to Piccirillo? Did you say to Piccirillo what is this this guy is trying to get us in? We got to him somebody with a tire iron, did you say that?

A We might have said a few words.

Q Not what you might have said, I don't want to put words in your mouth. I want you to tell me the story. What did you say if you said anything?

A I don't recall, I don't recall.

[fol. 25] Q Did you talk to Piccirillo about it?

A I don't recall. I probably did but I don't remember any words.

Q Did Tony show you the tire iron there in the restaurant?

A No.

Q How did you know there was a tire iron to be used?

A He said it.

Q He told you?

A Yes.

Q He said to you I want you to use a tire iron or words to that effect?

A Yes.

Q Did he?

A Yes.
Q How did he say it?
A That was in the car, I don't recall how it was said.
Q What kind of a car?
A It was an old Ford.
Q What year?
A I can't say exactly. But it wasn't no new car.
[fol. 26] Q Did you know the year of the car once?
A I think it was a 1953 or a 1954.
Q What color?
A Black.
Q All black?
A I think black and white.
Q Was it a roadster?
A I don't know what you mean by "a roadster"?
Q An open car?
A What do you mean? A convertible?
Q Yes.
A No.
Q Two passenger, four passenger?
A Two passenger, I think so.
Q Two passenger's? Only two people get in it?
A Two door, I thought you meant.
Q Was it a station wagon?
A No.
Q Do you know what a station wagon is?
A Yeah.
Q What is your usual occupation?
A I'm a trailer driver.
Q You drive?
[fol. 27] A Yes.
Q Did you ever have a car of your own?
A Yes.
Q How long are you driving?
A What do you mean how long am I driving?
Q How long have you had a license to drive an automobile?
A I don't recall. Four years. I don't recall just exactly, five years.
Q When you were eighteen?
A No, I was younger.

Q You were younger than eighteen when you had a license?

A Yes.

Q You are how old now?

A Twenty-two.

Q Were you twenty-one last March?

A Yes.

Q You were driving three, four years? Four years would bring you down to about 17?

A Yeah, I believe 17, about 17 or even 16 I think.

Q Where did you get your license?

[fol. 28] A Motor Vehicle, New York.

Q Do you know the difference between automobiles?

A Do I know the difference?

Q Yes, between automobiles? Between one automobile and another automobile? Do you know the difference between a Foard and A chevrolet, or a Ford and a Cadillac?

A Yeah.

Q So you got in the car, a Ford?

A Yeah, I believe so.

Q Where did you sit in the car?

A In the back seat.

Q Who drove the car?

A Tony.

Q Where did Piccirillo sit?

A Alongside of him.

Q In the back?

A The front.

Q Did you say anything to the business agent or whatever the fellow who takes care of the shaping up is? Did you tell him you were leaving?

A He was already gone. The job starts at 7 o'clock in the morning.

[fol. 29] Q You had no work for that day? Is that what you are telling us?

A No.

Q Which way did you drive? Do you know Brooklyn streets?

A No.

Q You don't know Brooklyn Streets?
A I know a few streets. I live there.
Q You drove for four years, maybe a little more than four years, you had your own license?
A Yes.
Q Your own automobile?
A Yes.
Q How many automobiles did you own?
A One.
Q What kind was it?
A An old DeSoto.
Q When?
A Last year I think it was, sir. It was last year or—last year I think so, yeah.
Q Did you drive other people's automobiles? Friends automobiles?
[fol. 30] A Do I?
Q Did you?
A Did I?
Q Yes.
A I drove my brother-in-law's car.
Q What kind?
A 1957 Pontiac.
Q From the time you got your license, did you drive automobiles?
A From the time I got my license?
Q Yes.
A In other words, I had my license?
Q Yes.
A Did I drive automobiles?
Q Yes.
A Yes.
Q How many about?
A I don't know. I couldn't—
Q Did you drive any trucks?
A I drove a truck.
Q When did you start driving a truck?
A I think it was last year.
[fol. 31] Q What did you do before that?
A I worked on the platform.

Q Where?
A Service trucking.
Q Where?
A Jersey City.
Q How would you get to Jersey City?
A Through the Holland Tunnel.
Q By automobile?
A By automobile, hitch a ride.
Q How long did you drive a truck for Service? Were you working for Service as a truck driver?
A Yes.
Q Where was your route?
A Well, driving a trailer could have went anyplace.
Q Like where?
A Come into New York, in New Jersey, the Bronx.
Q Brooklyn?
A Brooklyn, Queens.
Q How big a truck was it?
A Well, the trailers were 40 footers.
Q What would you transport in the trailer truck?
[fol. 32] A Canned goods, frozen foods.
Q Where would you drop off this stuff?
A All different places.
Q Like what?
A A & P's.
Q Different locations of A & P's?
A Yeah, warehouses.
Q Where are some of the warehouses of A & P?
A There is one on Decatur Street in Brooklyn, there's an A & P at Port Newark, New Jersey.
Q I mean here in Brooklyn?
A You are saying here in Brooklyn?
Q Yes.
A Decatur Street.
Q Is that the only place you ever dropped off stuff when you were driving a truck in Brooklyn?
A I wouldn't say it was the only place.
Q Where else?
A We delivered to Brooklyn piers.
Q Where are the piers in Brooklyn?
A Port authority piers.
Q Where?

[fol. 33] A I believe it's Bergen Street or something.

Q Where would you start off from driving the truck?

A Where would I start off from?

Q Yes.

A Jersey City.

Q How would you get to Manhattan?

A Come right through the Holland Tunnel or we could use the Lincoln Tunnel or George Washington Bridge I guess.

Q You mean you use the Holland Tunnel, where would that let you off? Canal Street? Did you ever hear of Canal Street?

A Yes.

Q Did you ever use Canal Street?

A Holland Tunnel can take you out—you can hit Hudson Street.

Q Where is this Holland Cafeteria?

A On Canal Street.

Q And what other street?

A It's Canal Street. It's between Varick and Hudson Streets.

Q That's right by the Holland Tunnel exit and en-
[fol. 34] trance, isn't it?

A Just around the corner.

Q That's why you met there, isn't it, because it was so convenient to the tunnel?

A There's a bunch of friends. We are all from the job. We stop and have coffee. When I went over to Jersey sometimes I stood in New York and used the phone if I was working that day if it reached me.

Q Did I understand you to say that you went to the Holland Cafeteria because it was like a shape up place?

A It was a shape up place for the New York jobber.

Q That's right?

A Yeah, you used to work out of a phone booth. The shop steward used to meet there with his men.

Q You got into this Ford automobile with this Tony and Ralph Piccirillo, anybody else?

A No.

Q And Tony drove?

A Yes.

Q Which way did he come to Brooklyn?
A Manhattan Bridge.
[fol. 35] Q Then what? Did you recognize any of the streets?
A Flatbush Avenue.
Q Yes? How did you get out to Blake Avenue?
A Tony drove me.
Q Did you watch the streets?
A I just watched them. I was just looking out the window, that's all.
Q Did you recognize any of these streets?
A I'm not too familiar.
Q You got to Blake Avenue?
A Yes.
Q While you were driving along, you were looking out the window, was there any conversation, any talk?
A There might have been a few words in the car but I can't recall it.
Q Did you wonder where you were going?
A Yeah, I wondered where I was going. I just sat.
Q Did you wonder whether you were being kidnapped or something?
A I wasn't thinking at that time.
Q Is it your usual practice to contract and get paid [fol. 36] for hitting somebody?
A No.
Q Did you ever hit anybody before this time?
A No.
Q So out of a clear blue sky you take a contract to make a hit?
A I needed the money.
Q That's what you want this grand jury to believe as your testimony, is that correct?
A I don't understand.
MR. PANZORELLA: I withdraw that question.
Q Now, you got to a location in Brooklyn?
A Yes.
Q You got out of the car?
A Stood in the car a while.
Q Yes, what happened?
A Waiting for this man to come.

Q Did you know who it was going to be?
A No.
Q Were you told the name of the man?
A No.
[fol. 37] Q Did you get a description of the man?
A No.
Q What was supposed to happen?
A The man came.
Q No, No. What was supposed to happen? What did Tony say to you while you were sitting in the automobile, the three of you were sitting in the automobile by a housing project? Is that right or were you in the parking lot?
A By a housing project.
Q Any police around?
A Not that I seen, no.
Q Where were the weapons?
A They were in the car.
Q Where, front seat, back seat?
A I don't recall where it was.
Q Where did you get your weapon from?
A This Tony.
Q He handed it to you?
A Yes.
Q Where did it come from?
A He must have had it in front with him.
[fol. 38] Q Did he give you something?
A Yes.
Q This tire iron?
A Yes.
Q Just like that, handed it to you?
A Yes.
Q What did you do with it? In other words, did you get out of the car, hold this tire iron in your hand, and walk the street?
A No, I didn't hold it in the air.
Q What did you do with it then?
A Just held it in my hand.
Q How were you dressed?
A Work clothes.

Q Work clothes?
A Regular clothes.
Q Did you have a coat on?
A No.
Q A jacket?
A Jacket.
Q Zippered jacket?
A No, I don't think so.
[fol. 39] Q Three quarter jacket?
A No, regular jacket.
Q Leather?
A No.
Q Cloth?
A Cloth it was.
Q Did you hide the weapon under your jacket?
A I didn't hide it under my jacket. I just had it in my arm by the arm.
Q You slipped it under your arm?
A No, I just had it on my arm like this.
Q You were hiding it?
A Yeah, as I am walking across the street.
Q Were you swinging it in your arm or did you hold it close to your body?
A No, I just walked with it.
Q What did Piccirillo have?
A I believe it was the same thing.
Q Do you know what a tire iron is?
A I what?
Q Tierod?
A A tierod?
Q Yes.
[fol. 40] A No.
Q You don't know what a tierod is?
A No, I don't understand, "a tierod."
Q And you are a truck driver?
A Yes.
Q What steers a car or truck?
A I'm just a truck driver, I'm no mechanic.
Q What steers an automobile or truck if you know?
A If I know?
Q Yes.

A The Steering wheel.
Q What is the steering wheel connected to?
A The names, I don't know.
Q Aren't you interested?
A No.
Q Did you ever work on an automobile?
A No.
Q Never?
A Put oil in the car, that's about it.
Q Your own car?
A Yeah.
[fol. 41] Q Your brother-in-law's car?
A I put oil in my brother-in-laws car.
Q Your friend's car?
A I wouldn't know if I put oil in.
Q Did you ever hang around any gas stations?
A I don't believe so. I stood near a garage.
Q Whose garage?
A On Kenmare Street.
Q In Manhattan?
A Kenmare and Mulberry.
Q What is the name of the owner?
A I don't know the owner. I just stood near it. There used to be an old man that worked in there, an old colored fellow. I don't know his name. His name was Pop. He used to tell us stories. That's before I was married.
Q How about around your home in Brooklyn?
A How about what?
Q Any gas stations around?
A Is there any gas stations around?
Q Yes.
A Yeah, there's gas stations there.
Q Close by?
[fol. 42] A Five blocks, four blocks.
Q Where did you gas up?
A I gassed up in Brooklyn, Jersey.
Q You didn't have a favorite place close by home?
A I don't know what you mean by "favorite". When I needed gas I pulled in.
Q Any special gas?
A No.

Q Any garages around your house?
A There's a gas station and garage.
Q Which one?
A On 39th Street and 9th Avenue there is a garage.
Q Do you know any of the fellows there?
A I just know them by sight, I don't know their names. Waxman's Garage.
Q Waxman's?
A Waxman's.
Q Any of your friends work there?
A No.
Q Never worked on any cars, you?
A No, I don't know nothing about mechanical work.
[fol. 43] Q Now, Piccirillo had an iron, a piece of iron?
A Yes.
Q Can you describe it?
A It was skinny in the middle and fat on two ends.
Q In other words, the ends are fatter than the middle?
A Yes.
Q How long was it?
A I don't know. They are this long. (Indicating).
Q You don't know?
A I don't know how long.
Q Was it two inches long?
A No, it wasn't two inches long.
Q Was it a foot long?
A It might have been a foot.
Q Or was it over two feet long?
A I don't think it was over two feet long.
Q You are sitting in a car, not in a parking lot?
A In a car.
Q Not in a parking lot, in the street?
A In the street.
[fol. 44] Q Which street? Blake Avenue or the other one?
A I believe it's Blake Avenue.
Q What happened?
A We sat there for a while until this man pulled up into the parking lot and Tony said, "That's the man in the white car."

Q White car?
A Yes.
Q Could you see where the man parked?
A Could I see where he parked?
Q Yes.
A I don't recall. He parked in the parking lot.
Q Then, what did you do?
A I got out and walked into the parking lot.
Q With Ralph Piccirillo?
A Yes.
Q Did you walk up to the car?
A No, the man was out of the car already.
Q You walked up to him?
A Yes.
Q Say anything to him?
A No.
[fol. 45] Q Did you call him by name?
A No.
Q Did you know his name?
A No.
Q Did you hit him?
A Yes.
Q With what?
A Tire iron.
Q Where did you hit him?
A In the legs.
Q Did Ralph hit him?
A Yes.
Q Where?
A I believe it was the legs or the side of the arm?
Q Did you hit him in the head, you?
A No, I don't recall hitting him in the head.
Q Ralph hit him in the head?
A I don't know.
Q Did the man fall?
A Yeah, I believe he did fall.
Q How many times did you hit the man?
A I don't know, about four times.
[fol. 46] Q Always in the legs?
A Yes, in the legs.
Q Did you recognize the man?

A I recognized him.
Q Is he the man you hit?
A Yeah, I believe so.
Q What part of the legs did you hit him in?
A On the side.
Q Where?
A On the side.
Q You were close by his automobile when this happened or were you out in the open?
A It was in the open.
Q Were you facing the man?
A Yeah.
Q Face to face or was his back turned to you?
A It was face to face.
Q While you were facing him, was Ralph Piccirillo with you?
A Yes.
Q Was Ralph on your right side or on your left side?
[fol. 47] A He was in front of me.
Q Who?
A Ralph was in front of me.
Q He was in front of you?
A Yes.
Q And you had to reach over Ralph to hit the man in the leg or what?
A I went alongside of Ralph and I hit the man in the leg.
Q Now, then you went alongside of Ralph, where was Ralph? On your left side or on your right side?
A I believe it was the left, left side.
Q He was on your left side?
A I believe so.
Q How were you swinging this iron? Stand up.
A What do you mean?
Q Stand up. You have the iron in your hand?
A Yes.
Q How were you swinging it? Show this jury.
A In the leg, that's all. (indicating)
Q The man was standing, is that right?
A Yes.

[fol. 48] Q In front of you, facing you?

A Yes.

Q So, where did your blows hit him?

A In the legs.

Q Over here?

A Over here (indicating).

Q It would be the left side of the man's body?

A I imagine so.

Q Don't imagine, was it? I am asking you a direct question. What part of his body did you hit him in?

A I think it was the left side; the left side, must be. The man fell down.

Q Did you hit him on the head?

A No, I didn't hit him on the head. Maybe it slipped or something. That was it. The iron fell and I ran.

Q You dropped the iron?

A Yes.

Q Was the man bleeding from the head when you looked at him?

A I turned around and he was bleeding from the head.

Q Where did you run to?

A Well, I turned around and looked to see if this [fol. 49] Tony guy was still in the car and there was nobody there.

Q What happened?

A I ran away. I don't remember in which direction. I don't remember if I ran through the project or what.

Q What happened?

A A policeman caught me.

Q You were taken to the police station?

A I was taking to the housing project police, the police station.

Q When you were in the police station, did an Assistant District Attorney come to the police station to question you?

A Did he come?

Q Yes.

A I believe it was an Assistant District Attorney.

Q There was a man with a machine similar to this reporter here taking questions down and the answers that you gave?

A Yes.

Q Did you tell the Assistant District Attorney that you asked this man how much money was going to be paid, did you tell him $50 you were going to get paid?

A I don't recall if I told him.

[fol. 50] Q Did you say in answer to a question, and this is page 8 of the stenographic statement number 19050 taken at the 73rd Precinct, on March 19, 1964, at about 7:43 p.m., by Assistant District Attorney Leon Port, Anthony Vonofforio, Hearing Reporter, and on page 8, "Question—What happened after that?" Your answer, "We were in the Holden Cafeteria." Now, I stop here a minute and ask you, is this the same cafeteria that we are talking about?

A It's Holland.

Q Holland?

A Yes.

Q "And some man came in and approached us and asked us if we wanted to make a few dollars and we said yeah, and we said how much and he said that we would be well taken care of, don't worry about it." Is that right?

A Yeah.

Q Then the question was put to you, "You didn't ask how much?" And you answered, "I asked how much and he said we would be well taken care of." Do you remember that?

A Yeah, I remember that there but I—

Q You didn't remember about the $50 then?

[fol. 51] A I was in quite a bit of a daze at that time.

Q Why?

A Why?

Q Yes.

A I was beat.

Q By who?

A Police officers, detectives.

Q How many?

A I say about six.

Q They beat you?

A Yes.

Q What kind of beating? Did you have any marks on you?

A Nothing to—I had a little mark near my ear but it was just a—

Q Wasn't that mark near your ear when Jack Graham got a hold of you, when the man that you were beating with the tire iron grabbed you by the neck?

A No.

Q He didn't grab you by the neck?

A No.

Q Didn't touch you?

[fol. 52] A No, not that I remember, didn't touch me.

Q Did you have any other marks on your body?

A I might have had one or two marks on my back, but—

Q Did you tell the Assistant District Attorney that you were beaten up?

A No, I didn't tell tell him then and there.

Q Did you tell the Correction Department when you were taken into jail the next morning, when you were going for arraignment before a judge and they asked you, you didn't tell them in jail?

A Who asked me?

Q The Correction Department in the pen behind the felony court; you were taken to felony court, weren't you?

A Yeah, I was arraigned or set bail or something like that.

Q In the pen there before you got to the courtroom, didn't the correction officer ask you whether you were complaining about anything?

A I don't recall if he did.

Q Did you make a complaint?

A I don't think I made any complaints.

[fol. 53] Q You don't recall that?

A I don't recall it.

Q All right. Now, you appeared before the judge?

A Yes.

Q Did you tell the judge that you were beaten up?

A I don't believe I said anything. I just went for bail.

Q Did you have a lawyer?
A No.
Q No lawyer?
A I didn't have no lawyer before that, no.
Q Did you ask that a lawyer be assigned to you?
A Did I ask if a lawyer be assigned to me?
Q Yes.
A No, I just made bail. That's all.
Q Who made bail?
A What do you mean, "who made bail?"
Q Who made bail for you?
A My mother was in the courtroom.
Q Without a lawyer?
[fol. 54] A Without a lawyer.
Q The judge talked to you?
A I don't remember what he said if he did speak to me.
Q Did you plead guilty or not guilty?
A I don't recall.
Q You don't recall what happened in that court?
A No, I don't recall. I can't put it in my mind. I know the day I made bail.
Q How much bail?
A A thousand dollars bail.
Q Who set that?
A Who set it?
Q Yes.
A The judge.
Q You heard the judge say that?
A A thousand dollars bail.
Q You didn't hear anything else?
A No, I don't remember hearing anything else as far as that goes.
Q You don't remember being asked how do you plead in this case, guilty or not guilty?
[fol. 55] A No, I don't remember being asked that there. No I don't. I don't remember right then.
Q Do you know Carl D'Angelo?
A Yes.
Q Who is he?
A He is an attorney.
Q Your lawyer?

A Was.
Q At that time?
A Not just at that time, no.
Q Not just at that time?
A No, I was in the police station all night and I came out and I went in front of the judge and that was it.
Q Carl D'Angelo wasn't there?
A No, I didn't have him yet.
Q Who is Antoinette LaBello?
A My mother.
Q She put up bail for you through a bondsman; is that correct?
A Yes.
Q Did you get out on bail?
A Yes.
[fol. 56] Q Right away?
A A few hours later. I guess about 5 o'clock in the afternoon, 5:30.
Q Did you tell anybody you got beat?
A I told my mother as soon as I got outside.
Q Who else did you tell?
A I told the attorney when I seen him.
Q When did you see the attorney?
A Well, I think I went back to court the following week. I went with no attorney, I didn't have any attorney yet. They jacked up the bail another thousand dollars and I went in until my time and then I got out again. The next time I went I went with Carl D'Angelo.
Q Did you tell Carl D'Angelo that you got beaten by the police?
A Did I tell him?
Q Yes.
A No.
Q Did you tell any judges about that?
A I don't recall speaking to any judges.
Q Was it the truth that you had beaten Jack Graham?
[fol. 57] A Was it the truth?
Q Was it the truth when you admitted that you beat Jack Graham?
A Yes.
Q Was it the truth?

A Yes.

Q So you got beaten by the police for what?

A They wanted me to talk, I don't know what they were saying, I don't remember. All I know is I got a beating that was it.

Q Were you the only one that got a beating?

A No, I believe Ralph got a beating too.

Q Did you see him get beat?

A No, I didn't see him get beat.

Q Did you tell any judge at any time?

A I don't recall telling any judge.

Q Never?

A No.

Q Did you ask your lawyer to tell the judge that you got beaten?

A I told my lawyer. I don't recall him telling me that he did tell the judge.

[fol. 58] Q Did you tell your last attorney, Mr. Legham, (phonetic spelling) that you did get beaten up by the police?

A Yes.

Q You did tell him?

A Yeah.

Q When?

A I don't recall when. When I got him as an attorney.

Q What did Mr. Legham say?

A I don't remember.

Q Did he tell you not to worry about it, it doesn't mean anything?

A I don't remember if he said it.

Q Now, as I recall your testimony, Mr. LaBello you said that when you got to Blake Avenue at the housing project you remained in the automobile?

A Yeah, for a while.

Q For a while?

A Yes.

Q Did you get out of the car before Graham drove up in his car? Did you get out of the car before he drove up?

[fol. 59] A Yes. As he drove in the parking lot I got out.

Q Referring to statement 19050, page 9, you were asked this question: "What happened after that?" Your answer, "He dropped us off, I don't know the name of the street." "Blake Avenue?" "Yes." "Then what happened?" Your answer, "He went away and he said, "I'll be back to point the guy out." So, we were standing across the street from the parking lot and he walked back and he pointed and we went across the street to the parking lot and that's when I hit the guy." Now, Mr. LaBello, which was the truth, what you said on the night of March 19th at the police station or what you told this grand jury here and now?

A I'm telling you now I told you I was fogged up when I gave that statement, a bit.

Q Why?

A I was fogged up.

Q How?

A I was all punched up and hit with a hose and all.

Q You got hit with a hose?

A Yes.

Q Where?

A All over.

Q In the head?

[fol. 60] A Yes.

Q In the face?

A No, the face no.

Q No marks?

A I told you I had one mark along my neck. That was it and on my back I think there was one.

Q That's all?

A That's all.

Q You were fogged up?

A Yes.

Q You were out on bail from April 1964 until January of 1965, is that correct?

A Was it April I was out on bail or was it March?

Q Well, your bond here is dated March 20th and then you said that—

A The bail was raised.

Q Raised to $5000?

A $2000.

Q But anyhow you weren't in jail, but for a couple of days, is that correct?

A Well, I was overnight in the police station.

Q So let's give you the benefit of the doubt we will [fol. 61] say from April 1, 1964 until the date that you were sentenced by Judge Barshay and that was when?

A January 11th.

Q January 11, 1965, you were out in the street; is that correct?

A Yes.

Q Did you go back to that cafeteria on Canal Street?

A Yes, sure.

Q Were you looking for Tony?

A Yes.

Q Did you ever find Tony?

A No.

Q Never found him?

A No.

Q Did you ask for him?

A Who was I going to ask?

Q I don't know, I asked you the question.

A No.

Q You never asked for anybody?

A No.

Q Never saw him?

[fol. 62] A No.

Q Never get paid for your job?

A No.

Q To this day you don't know who this Tony is?

A No, I don't know.

Q You don't know?

A No.

MR. PANZORELLA: Thank you that is all.

(WITNESS EXCUSED)

[fol. 63] RALPH PICCIRILLO, residing at Sing Sing Prison, was duly sworn as a witness and testified as follows:

BY MR. PANZORELLA:

Q Mr. Piccirillo, this grand jury is investigating the assault on Jack Graham and any conspiracies in connec-

tion therewith. You have been called as a witness before this grand jury, you were sworn, which means that under the law you cannot be prosecuted for whatever testimony you give in answer to any questions put to you. You have already been convicted by your own plea of guilty in the crime of assault on Jack Graham and you cannot be prosecuted anymore for that. I am going to do one thing. I am going to ask this grand jury to vote on the question of giving you immunity and under Penal Law Section 2447 for the testimony that you will give in this grand jury and that means anything that I ask you and any answers that you give in answer to my questions if it connects you with the crime you cannot be prosecuted for it. That's immunity, do you understand that?

A Yes.

Q Now, if you would step out of the room, the grand [fol. 64] jury will vote on the question of whether to give you immunity or not.

(Whereupon the witness, Ralph Piccirillo, Mr. Panzorella, and the stenographer left the room.)

(Whereupon the witness, Ralph Piccirillo, resumed the stand and testified as follows:

MR. PANZORELLA: Mr. Forman, has the grand jury taken a vote on the granting of immunity to this witness?

THE FORMAN: We have.

MR. PANZORELLA: What was your vote?

THE FORMAN: We have voted to grant this man immunity.

BY MR. PANZORELLA:

Q Now Mr. Piccirillo, you heard the forman of the grand jury?

A Yes.

Q You heard that the grand jury has voted to grant you immunity under the law of Section 2447 and again I repeat that means that any testimony you give here [fol. 65] if it connects you with the crime you cannot be prosecuted for it?

A Yes.

Q Now, you said you wanted to make a statement, make your statement.

A I just want you to know I'll answer the questions. I'd just like to speak to my lawyer.

Q Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?

A Yes.

Q Now, I'll put the questions to you. Did you on September 9, 1964, in the Criminal Term Part 5 of the Supreme Court of the County of Kings before Mr. Justice Barshay take a plea of guilty to attempted assault in the second degree, an assault on Jack Graham?

A Yes.

Q Were you sentenced on January 11, 1965, by Judge Barshay to one year and three months to two years and six months in Sing Sing Prison?

[fol. 66] A Yes.

Q Now, at the time of your taking the plea, the court asked you or told you and I'll read it from the minutes:

"The Court: Is it true that you of your own free will wish to withdraw your plea of not guilty to the indictment charging you with assault in the second degree and of your own free will and with full understanding of what you are doing wish to plead guilty to the felony of attempted assault in the second degree, unarmed?"

And your answer was:

"Defendant Piccirillo: Yes, sir."

"The Court; Are you guilty?"

"Defendant Piccirillo: Yes, sir."

"The Court: You heard LaBello just admit his guilt. He said you and he assaulted Jack Graham and inflicted severe injury upon him. Did he tell the truth about himself and about you?"

"Defendant Piccirullo: "Yes, sir."

That was the truth, wasn't it?

A Yes.

Q You admit that you assaulted Jack Graham?

[fol. 67] A Yes.

Q Now, so that we don't misunderstand, I show you these two photographs and ask you whether you recognize the man in the photographs?

A Yes.

Q Is that Jack Graham that we have been talking about?

A Yes.

Q Is he the Jack Graham to whom you admitted assaulting?

A Yes, sir.

MR. PANZORELLA: I offer these two pictures in evidence as People's Exhibit 1, this date.

(Whereupon the two pictures were marked as People's Exhibit 1, today's date.)

Q Let's go back to March 19, 1964, do you remember that date?

A I remember the date.

Q Well, do you remember the date that Jack Graham was assaulted by you?

[fol. 68] A Yes.

Q That was March 19, 1964?

A Yes.

Q. Now, tell us please, tell the grand jury all of the facts leading up to the assault on Jack Graham. Tell us the entire story on it, please.

A Me and this Mr. LaBello were in a luncheonette on Canal Street, the Holland Cafeteria. This fellow approached us and he asked us if we wanted to make $50. So all we had to do was hit this fellow in the leg. That's all. We told him yes. He put us in a car and he took us over there and he pointed this fellow out when he pulled up with the car and we went and we struck him on the legs. When we went to go back to this fellow's car he took off and left us there and we ran the other way and we were caught by the cops.

Q That's the whole thing?

A Yes.

Q Now, how long have you known Anthony LaBello?

A A long time.

Q About how long?
A Five, six years, something like that. I don't re-
[fol. 69] member. We used to go to the same school together.
Q Which school?
A P.S. 130.
Q Where?
A In Manhattan.
Q Where were you living in and around March of 1964 before you were arrested?
A 2327 82nd Street, Brooklyn.
Q What is the address 1308 Manhattan Avenue, Union City, New Jersey?
A That's an address I used for my Jersey license to work.
Q Who lives there?
A A friend of mine.
Q What is his name?
A What?
Q What is his name?
A Mr. D'Amato (phonetic spelling).
Q What kind of work does Mr. D'Amato do?
A Drives a truck.
Q For who?
A Service trucking.
Q Did you work for service trucking?
[fol. 70] A Yes.
Q How long?
A Since 1959.
Q Does LaBello drive a truck for Service Trucking?
A Yes.
Q But you have known each other for a long time?
A Yes.
Q You live close by each other don't you here in Brooklyn?
A Pretty close.
Q Did you pal out together?
A Yes.
Q Now, on the morning of March 19, 1964, how did you get to this cafeteria?

A I don't remember if it was by train or my uncle used to pick me up in the morning, drive me to work.

Q And LaBello too?

A No, no—yeah, some mornings I used to pick him up.

Q But you don't recall about this morning of March 19th?

A Yes, I told you just what happened.

[fol. 71] Q How did you get there?

A How I got to the cafeteria?

Q Yes.

A I don't remember.

Q You don't remember?

A No, I don't know if it was by train. Some mornings my uncle did pick me up, some mornings he didn't pick me up.

Q Did you use LaBello's car by chance?

A No.

Q He had a car?

A I don't know if he had a car.

Q How about the Desoto?

A I don't know if he had it then or not.

Q What time did you get to the cafeteria?

A About 6:30.

Q What was the reason of going to the cafeteria?

A That's where we shape up in the morning for the job.

Q Shape up for what?

A Rufello Trucking (phonetic spelling).

Q You had the shop steward there?

A Yes.

Q What is his name?

[fol. 72] A Charles Bannanti.

Q Did you give him your name that morning.

A You mean to go to work?

Q Yes.

A He don't take you names in the morning. If we don't work, we don't work.

Q How do you get to work?

A If there's enough trucks in he dispatches us from that luncheonette. Either he takes us with his car if he's going that way or we take a bus or train to meet the truck.

Q How many fellows shaped up that morning, about?
A Maybe fifteen, twenty. Between two jobs there I couldn't tell you.
Q I see. Did you get the employment that morning?
A No.
Q Then what happened?
A We hanged around there for a while until everybody left. Then this fellow approached us.
Q Who was it?
A I don't know his name.
[fol. 73] Q You don't know his name?
A No.
Q Never heard his name?
A He said something about his name being Tony when he drove us to the car but I couldn't say whether it was or not.
Q What did Tony look like?
A About 5'7", like that. A little husky, black hair, wavy hair.
Q Wavy hair?
A Yeah.
Q What kind of features did he have?
A Round features, round face.
Q Light skin?
A Yeah, light skin.
Q Did he need a shave?
A I don't remember.
Q Did he have a beard?
A He had no beard.
Q A mustache?
A No.
Q How was he dressed?
[fol. 74] A He had a black suit on and a black raincoat.
Q Was he hairy or not?
A What do you mean "hairy"? You mean on his head?
Q Yes.
A He had hair.
Q How about on his hands?
A I don't remember if he had hair on his hands.

Q Did he have clean hands or dirty hands or what?
A He had clean hands. He had a suit on.
Q Did you look at his hands?
A No.
Q How do you know he had clean hands?
A I guess if you are wearing a suit and a coat you are not working on a truck as I do you should have clean hands.
Q Was Tony a truck driver?
A I don't know.
Q Was he shaping up?
A Not with us.
Q How did he come to come to you?
A He just walked over to us.
[fol. 75] Q Where were you sitting?
A In the front table.
Q Who was with you?
A Me and Tony.
Q That's all?
A That's all.
Q And this fellow walked over to you?
A Yes.
Q Did he sit down?
A Yes.
Q What did he say?
A He said if we wanted to make a few dollars. So we asked him how. He said all you have to do is hit this fellow in the leg. I'll point him out to you, don't hurt him and come back and I'll give you $50.
Q Come back where?
A To his car which happened he ran away on us.
Q How long did you stay in the cafeteria?
A With him?
Q Yes.
A About a half hour, something like that. I don't remember to be exact.
[fol. 76] Q What did he tell you about the $50?
A He said as soon as we got back in the car he would pay us.
Q When did he say that he would give you the $50 for this hit?

A In the cafeteria.
Q In the cafeteria?
A Yes.
Q $50 for the whole job for both of you to share?
A I think it was $50 a piece.
Q You think?
A I'm not sure, I think it was $50 a piece.
Q What were you supposed to hit the fellow with?
A He gave us two irons in the car.
Q Did he give them to you in the cafeteria?
A No, when we got in the car.
Q Did you discuss it in the cafeteria?
A Yeah, we discussed it a little bit.
Q What did he say to you?
A He told us all we had to do was hit this fellow in the leg, that's all. Don't hurt him, just him him in the leg and come back to the car.
[fol. 77] Q Did you ask him with what?
A Yes. He said I'll give you something in the car.
Q Did you ask him what?
A Yes, he says a pipe.
Q A pipe?
A Yes.
Q Was it a pipe?
A It was sort of a tire iron.
Q What else?
A Another iron. I don't know what it was for.
Q Which one did you have?
A I had the big one.
Q How was it shaped?
A About that long (indicating).
Q How long?
A About that long (indicating) with two iron things on the end. I don't know what they were for.
Q It was fatter on the end than in the center?
A Yes.
Q You are a truck driver?
A Yes.
Q Is that a piece of iron that comes off from an [fol. 78] automobile or truck?
A Not off an automobile, maybe off a truck. I wouldn't know.

Q What part?
A It looked like something to change the tire.
Q The one that you had?
A Yes, but I'm not too sure.
Q Was your flat?
A No, it was sort of round.
Q Do you think you could change a tire with that iron that you had?
A If the nuts would fit it I guess.
Q Did you ever hear of a tierod?
A A tierod?
Q A tierod.
A It sounds like something from a car.
Q You are not a mechanic?
A No.
Q You never did any mechanical work on a car?
A Well, maybe put oil in the car or something like that but that's all.
Q Do you know anything about the steering mecha-
[fol. 79] nism of a car?
A No, I don't.
Q So you never heard the expression, "tierod"?
A I think I heard it. I think it comes from a car. I'm not too sure.
Q How did you get from New York to Brooklyn?
A This fellow drove us.
Q What kind of car did he have?
A His car was black. It was a Ford, I don't remember the year.
Q Was it a convertible?
A No, hard top.
Q How many doors?
A Four doors.
Q A four door car?
A Yes.
Q Where did you sit?
A In the front.
Q Where did LaBello sit?
A In the back.
Q Where were the irons?
A He had them under the front of the seat.

[fol. 80] Q What streets did you use to get to Brooklyn?

A I think we were on the Belt Parkway.

Q Which?

A On the Belt Parkway. Then he got off on one of the exits. I don't remember which streets he went through. I'm not too familiar with that section of Brooklyn.

Q Did you get to a project?

A Yes.

Q Do you know what project it was?

A No, I don't.

Q Did you park in the parking lot or in the street?

A In the street.

Q Did you get out of the car?

A Not right away.

Q How long did you stay in the car?

A Oh, about a half hour I guess, something like that. He was waiting for the fellow to come.

Q Did he tell you who the fellow was?

A When the fellow came with the car he told me.

Q How did he tell you?

A He said that fellow there with the white car, he's [fol. 81] parking it now.

Q Did you see into the parking lot?

A Yes.

Q Then what happened?

A Then he got out of the car and I walked over and hit him on the leg.

Q How many times?

A Once or twice.

Q Did you hit him on the head?

A No.

Q Who hit him on the head?

A I don't think none of us hit him on the head. I think he fell and hit his head. I could have hit his head but I don't think I did.

Q Was the man facing you or did he have his back to you?

A He was facing me.

Q On which side of you was LaBello?

A LaBello was in back of me.
Q LaBello hit him?
A I don't think so.
Q He wasn't to either one of your sides?
[fol. 82] A I couldn't tell you which side he was on. I know he was in back of me because I got out of the car first.
Q Did you run into the lot or walk?
A Walk in.
Q LaBello was behind you all the time or alongside of you?
A I don't know if he was behind me or alongside of me.
Q How did you carry your iron?
A In my hands.
Q Exposed?
A Yes.
Q Not wrapped up?
A It wasn't wrapped in nothing, I don't think so.
Q Did LaBello have an iron?
A Yes.
Q What kind?
A A one foot tire iron, one for a car, a narrow skinny one.
Q Where did the bat come into the picture?
A The bat?
Q Bat.
[fol. 83] A There was no bat.
Q No bat?
A No bat.
Q Do you remember being arrested?
A Yes.
Q Were you taken to the 73rd Detective Squad?
A I don't know if it was the 73rd or not.
Q Did an Assistant District Attorney come there with a stenographer with a machine like this?
A Yes.
Q Questions were asked of you?
A Yes.
Q You gave answers?
A Yes.

Q Referring to statement 19050 on page 2: "Question —what did he say to you?" Answer: "He told us if we would hit a guy with a bat he would give us some money."

A I didn't mean to say bat. They had the irons and they showed them to the District Attorney.

Q Why did you take this kind of contract?

A I needed the money. I'm a degenerate horse player.

[fol. 84] Q When was the last time you worked?

A That week I worked.

Q How much did you make?

A I only worked a few days.

Q How much a day do you make?

A $25.

Q Did you ever take a contract to make a hit like this before?

A No, sir.

Q Out of the clear sky a man walked over to you, a man you didn't know and asked you to make a hit?

A Yes.

Q You take it?

A I don't know a hit, I don't understand that.

Q You don't know that?

A No.

Q All right sir, referring again—

A I mean you're talking about hitting him?

Q What do you mean by "hit?"

A I don't know, I mean hitting him. I admit that I hit him. If I knew who this other man was in the car, if I knew him, and I knew his name I would tell you right now.

[fol. 85] Q You would?

A That's right, because I got three kids on the street and a very sick wife and right now they need me very much.

Q All you know of this man is that his name is Tony?

A Yes.

Q Is this the first time you ever saw him?

A I think so, yes.

Q You were out on bail, weren't you?

A Yes.

Q All the way up to the time of your sentence you were out on bail?

A Yes.

Q So that's approximately from the end of March, 1964 to January of 1965?

A Yes.

Q Did you ever go back to the restaurant, the cafeteria?

A Yes, I have to shape up there every morning.

Q Did you look for Tony?

A I looked around for him.

Q Did you ask anybody about Tony?

[fol. 86] A I asked the fellow in the back, the owner of the place.

Q What is his name?

A I don't know his name, the Spanish fellow. He's always there every day. I asked him. He said he doesn't know the guy.

Q Did you see a license plate on the car?

A I didn't notice the number. It must have had a plate on it but I didn't notice the number.

Q You don't know whether it's a Jersey car or a New York car?

A It's a New York car.

Q How are you sure of that?

A I seen the plate but I don't know the number.

Q No numbers that you remember?

A No.

Q No letters?

A No.

Q Did you talk very much while you were driving over to Brooklyn?

A No, not too much.

Q Did you ask Tony what did this fellow do that [fol. 87] we are going to hit, that you want us to hit?

A I asked him, he didn't want to answer me. He said, "If you want to do it then do it, if not, then get out of the car." So I said, "I need the money." I said, "I aint going to hurt this fellow, I'll hit him in the leg the way you told me and that's all." He said, "That's all I want you to do."

Q The shop steward, what was his name?
A Bannanti.
Q What is his first name?
A Charles.
Q Charles Bannanti?
A Yes.
Q Where does he come from?
A Brooklyn.
Q What part of Brooklyn?
A 56th Street I think, East 56th Street. He is a relation of mine.
Q You belong to the union?
A Yes.
Q What union?
A 707 and 560.
Q Of what?
[fol. 88] A Teamsters.
Q You are sure Bannanti didn't tell you to make this hit?
A No, sir.
Q Do you know anybody in housing?
A Me?
Q Yes.
A No, sir.
Q Did you know that Jack Graham was a contractor in housing?
A Not at the time I hit him. When I was going to court and everything then I found out who he was.
Q Any union men talk to you about this?
A No.
Q At any time?
A. No. Nobody. I don't know no union men anyway.
Q Do you remember what you said to the Assistant District Attorney in the police station?
A No, sir.
Q Why not?
A I don't remember—you want me to answer that truthful?
[fol. 89] Q Yes.
A Because I was dazed from all the shots in the head I got from a lead pipe.

Q A lead pipe?
A Yes.
Q Did you have any cut on your head?
A No, not on my head, on my back. I had them all over my body.
Q Who hit you?
A Every cop in the precinct hit me.
Q How many about?
A I would say about six or seven of them.
Q Did you get injuries?
A Not now. I had plenty.
Q Did you have injuries?
A Backaches and things like that.
Q To the head you are talking about?
A I got hit here, around here in my throat.
Q Did you tell the Assistant District Attorney that you got beaten?
A Yes, I did.
Q What did he say?
A He didn't say nothing. I don't even think it went [fol. 90] down on the thing.
Q You were held in the precinct overnight?
A Yes.
Q You were taken before a desk officer weren't you?
A I don't remember. I remember I was talking to the D.A. then they put me back in the room. The next thing I remember I was down in the cell.
Q The precinct?
A Yes.
Q The next morning you were taken to court, weren't you?
A Yes.
Q You were put in the cell behind the court?
A Yes.
Q You remember being asked whether you had any complaints?
A No, I was never asked.
Q Never asked?
A No.
Q Did you tell them that you were beaten?
A No.

[fol. 91] Q Were you bleeding?

A No. I had a lot of black and blue marks.

Q Did you show them to the Correction Department?

A No, sir. That's what I did wrong. I should have shown them to the Correction Department. I didn't though because I never went through this before.

Q Did you appear before the judge?

A Yes, sir.

Q Did you tell the judge you were beaten?

A No.

Q Why not?

A I didn't tell him.

Q Did you have a lawyer?

A No. When I went back the next week I didn't have a lawyer. I went to get legal aid, a legal aid lawyer. I went in front of the judge. He jacked the bail up and he threw me back in the cell before I could say anything.

Q Did you explain to anybody about your beating?

A No.

Q Did you tell your mother?

A No, I told my wife.

Q Your wife?

[fol. 92] A Yes.

Q The same day?

A That night when I got home. She seen all the marks on my back.

Q What did she do about it?

A Nothing. What could you do about it, you tell me?

Q I am asking you.

A You can't do nothing about it.

Q You were before a judge?

A Yes, sir.

Q You didn't tell the judge?

A I didn't get a chance to open my mouth.

Q You were asked in the cells behind the court by the men from the Correction Department?

A They asked me?

Q Yes.

A I don't remember.

Q You conveniently don't remember those things?
A I don't remember.
Q You told your wife but here you were standing in front of a judge and you didn't tell him?
A I didn't get a chance to tell the judge.
[fol. 93] Q Were you asked how you plead?
A I don't remember that. You should have the minutes there. I don't remember. I know I went in front of the judge. They read something off and he set bail $1000.
Q Oh no, he didn't say that. He said, "How do you plead? Guilty or not guilty?"
A That I don't remember.
Q He also asked you if you had a lawyer, do you want time to get a lawyer.
A I think he told me that, yes.
Q You remember that?
A Yes.
Q So you answered the judge?
A Yes, I think so.
Q You remember better now, don't you since I suggested it to you?
A Yes.
Q Didn't you talk to the judge?
A He asked me if I had a lawyer—no, I'm not sure. You have the papers there, why don't you read from the papers to me.
Q You were talking to the judge?
[fol. 94] A I don't know if I talked to the judge or Mr. LaBello talked to the judge.
Q Mr. LaBello was there? I am speaking about the first time.
A The first time we went in front of the judge we were arraigned or whatever you call it. I was put on $1000 bail.
Q Before you jump into the $1000 bail, you appeared before the judge, the clerk, the uniformed man, the bridge man read the complaint, is that right?
A Yes.
Q There was a police officer there?
A Yes.

Q Alongside of you?
A Yes.
Q He swore to the complaint, didn't he?
A Yes.
Q You saw him put his hand up and he swore to the complaint?
A I don't remember putting his hand up but he must have.
Q Then you were asked how do you plead, guilty or [fol. 95] not guilty?
A I don't remember.
Q These things you don't remember and the other things you do remember? He asked you did you have a lawyer?
A I don't remember. I know I didn't have no lawyer with me.
Q There was no lawyer there?
A No lawyer.
Q No lawyer was assigned to you?
A No.
Q Was your mother there?
A My mother was there.
Q Were you asked do you want time to get a lawyer?
A I don't remember.
Q The only thing you remembers is the $1000 bail?
A That's right.
Q And your case was put over for how long?
A I think a week.
Q Then you went back?
A Yes.
[fol. 96] Q Did you have a lawyer?
A No.
Q The second time you went back you didn't have a lawyer?
A No, I didn't have a lawyer.
Q Then what happened?
A I was just about to ask the judge for legal aid when he jacked up the bail to $2000 and they took me and put me in the cell. Five minutes later I was back in Old Queens.

Q When you went into Old Queens, were you examined?

A That night?

Q Yes?

A Maybe I was examined. I'm not too sure. They usually do.

Q When you went into the receiving pen you remember that?

A Yes.

Q How were you transported?

A By van.

Q When you went into the receiving pen, what happened in there?

[fol. 97] A They searched us.

Q Only searched?

A No, I remember you walk over to a doctor and he asked you does this hurt you, have you had that, have you had this.

Q What did you tell him?

A I told him no. He said put your clothes back on.

Q You were stripped?

A Yes.

Q Completely stripped?

A Yes.

Q Did you have any bruises?

A Yes, black and blue marks.

Q What did you tell the doctor about the black and blue marks?

A He didn't ask about that.

Q He didn't ask?

A No.

Q Never asked you a question about black and blue marks?

A No.

Q Did you volunteer it?

[fol. 98] A No.

Q You don't know who the doctor was?

A No, I don't know his name.

Q Then what happened? You put your clothes on?

A Yes.

Q Were you asked the general question, "Have you any complaints?"

A I don't think so. I had no complaints anyway. What's the use of complaining. Anyway I deserved the beating I got for hurting this man.

Q Now, you have a lawyer is that right?

A Yes.

Q What is his name?

A First the lawyer I had was Carl D'Angelo.

Q Did you tell Carl D'Angelo that you had been beaten?

A Yes, I did.

Q What did he say?

A There was no more marks then.

Q The marks disappeared?

A Yes.

Q Did you tell Mr. Legham about it?

[fol. 99] A Yes.

Q What did he say?

A Nothing.

Q Nothing at all?

A There was no marks. He said you should have said it the first day you got out of jail.

Q Did you tell him the confession was beaten out of you?

A Yes.

Q You did?

A Yes.

Q What did he say about that?

A He didn't say nothing.

Q Did he tell you forget it?

A He didn't say forget it. There is nothing you could do. What could you do?

Q He told you that there is nothing he could do?

A He didn't say nothing that he could do. I don't know if he did a thing or he went to see anybody. That I don't know.

Q Did you ask him?

[fol. 100] A No, I didn't.

Q Then you appeared before Judge Barshay and you took the plea of guilty?

A Yes.
Q Did you tell the judge you had been beat?
A No.
Q No?
A No.
Q Were you asked?
A No.
Q That's all you know about this case?
A Yes, sir.
Q Do you know an attorney by the name of Waltser (phonetic spelling), John Waltser?
A Might. They sent a couple of guys to appear with me a few times. I don't know their names. D'Angelo sent somebody to appeal for us too.
Q Everything you have told this grand jury is the truth?
A Yes, sir.
MR. PANZORELLA: Thank you. That is all.

(WITNESS EXCUSED)

(BILL FOUND)

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

1053/65

PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS

-against-

ANTHONY LA BELLO, RALPH PICIRIELO, DEFENDANTS

MINUTES OF MARCH 22, 1965

Appearances:

AARON E. KOOTA, ESQ.
District Attorney
By:
EDWARD A. PANZERELLA, ESQ.
Assistant District Attorney

EDWARD MINTZER
Grand Jury Reporter

PTL. WILLIAM A. SEWELL, Shield 2632 of the Housing Authority Police, was duly sworn as a witness and testified as follows:

BY MR. PANZERELLA:

Q Ptl. Sewell, are you a police officer attached to the housing police of the City of New York?
A I am.
Q On March 19, 1964, were you attached to the housing police force of the City of New York?
A I was.
Q What was your assignment on that day?
A I was assigned to Brownsville headquarters located at 528 Stone Avenue, Brooklyn, New York.
Q Is that a housing project there?
A It is.
Q What is the name of the project?
A Brownsville Headquarters.

Q Now, did an incident occur on that day which caused you to give chase and place under arrest one Anthony La Bello and one Ralph Picirillo?

A Yes.

Q Did you apprehend the two defendants?

A I did.

Q You arrested them?

A Yes.

Q Did you have a conversation with them?

A Yes, sir.

Q What was the substance of the conversation at the time of the arrest?

A Anthony La Bello and Ralph Picirillo stated that they were hired to, well, their words were, "To do in Mr. Jack Graham," the person who was assaulted.

Q Did you recover any weapons from the defendants La Bello and Picirillo?

A Yes, sir.

Q Do you have the weapons with you?

A Yes, sir.

Q Now officer, can you tell us which weapon was in the possession of which defendant or by their own admissions?

A Yes, sir. The larger weapon was in the possession of Picirillo, the smaller weapon was in the possession of La Bello.

Q Now, were these defendants indicted by a Grand Jury of Kings County?

A Yes, sir.

Q Now, while the matter was pending after the arrest, did you have any further conversations with the defendants or either of them?

A Yes, sir.

Q Will you tell this grand jury when and where you had the conversations with these defendants and what subsequently aspired?

A May I refer to my memo book?

Q Yes.

A On March 20th I appeared in Brooklyn Criminal Court, Part 1B. The defendants were placed on $1000 bail. While in court the defendant Picirillo offered me

$1000 or $1500 to change my testimony and to get rid of one of the weapons and also give them the name of the witnesses who possibly saw the incident occur. They asked me to meet with them and they would tell me what they wanted me to say and how to get rid of the evidence.

Q You mention the name of Picirillo, was Anthony La Bello present at that time?

A Yes; he was.

Q Any other person present at that time, other than you, Picirillo and La Bello?

A No, sir.

Q Did La Bello say anything to you at that time?

A Yes, sir. He said that $1500 was a lot of money and I could possibly use the money for some good. That I wouldn't be hurting anybody by doing this little favor for him, that they didn't want to go to jail.

Q Now, did you answer La Bello and Picirillo at that time?

A Yes, I did.

Q What did you say to them?

A They asked me to meet with them that night. They told me where, I told them I would meet with them.

Q Where did they ask you to meet?

A In Bickford's Restaurant. That's on Fulton Street, that's right across the street from the Fox Theatre.

Q That's in the County of Kings?

A Yes.

Q Did you report this to your superiors?

A Yes, I did. I called my commander.

Q Who did you report it to?

A Captain Ladee (phonetic spelling), the captain in charge of the plainclothes division in the housing authority police.

Q Who else did you report it to?

A I went directly to the Municipal Building, I spoke to Mr. Panzerella. I advised him of the offer I had been made. I told them they had wanted me to meet up with them.

Q As a result of these reports, did some arrangement take place?

A Yes, sir.

Q What took place?

A I was advised to meet with the two defendants at the specific time specified. I was given equipment, I think it's called a miniphone. I also had two detectives from my command with me. I had two detectives from the District Attorney's Office with me. I also had a gentleman from the C.I.B. Division, Detective McBride with me also when I met with them in Bickford's.

Q What time did you get to Bickford's Restaurant on Fulton Street in Brooklyn?

A I arrived at 8:30 p.m.

Q Were the defendants in the restaurant when you arrived?

A No, sir.

Q Did you seat yourself somewhere in the restaurant?

A Yes, I did.

Q Did you wait for the defendants?

A Yes.

Q Did the defendants arrive?

A Yes. After approximately ten, say ten to fifteen minutes—there were several people in Bickford's who watched me, they came by. In fact, one person sat at the table, no one ever said anything. The two gentlemen sitting at the table directly in front of me, they stood up, they walked outside. Two other people came in, they sat next to me, they also got up, they walked out. A young lady came in and sat at the table. She stayed approximately two minutes and she got up and she walked outside. After approximately two or three minutes Anthony La Bello and Ralph Picirillo entered Bickford's Restaurant.

Q Did La Bello and Picirillo come to where you were seated?

A Yes.

Q Was anybody else with them?

A No, no one that I could see.

Q Did they seat themselves?

A Yes, they did.

Q Did you have any conversation with the defendants, La Bello and Picirillo?

A Yes. They asked me to first of all change the table from where I was sitting.

Q Did you do so?

A Yes, I did, sir.

Q Then what occurred?

A They stated that the offer they made me this morning of $1000 or $1500 to get rid of the evidence, change your story or your testimony which will be in court, or give us the name of the two witnesses involved and in their words was to be able to get to them with some money.

Q Which one said what to you?

A Picirillo stated that he used the heavy pipe which is the large heavy pipe. He stated he struck Mr. Graham in the head, in the leg, and in the back with the heavy pipe. La Bello stated he hit him on the arm, the back, the shoulder with the lighter pipe. They stated that $1500 would be mine. I had nothing to worry about that—

Q Who said this to you?

A Actually in substance, both were doing the talking.

Q Yes, but tell us what each one said as you best recall.

A Picirillo stated that they had met this particular person in a diner and that he had offered them money to beat Mr. Graham up. He stated that they were driven to Brownsville Projects. Someone, the gentleman who drive them there dropped them off on the corner, someone else pointed Mr. Graham out. They proceeded to the parking lot. When Mr. Graham stepped out of his car they assaulted him and they left.

Q With respect to the offer of money to you, did Picirillo offer you money?

A Yes, sir. Picirillo offered me $1500 to change my testimony to a statement that would be given to me later. They would have someone contact me later, tell me exactly what to say. I was to get rid of one of the pipes.

Q Which one?

A The large pipe and I was assured I would be assured by the person or persons that would contact me that I had nothing to worry about as far as my job was concerned or as far as getting in any type of trouble. They would take care of all these arrangements.

Q What did La Bello say to you?

A He stated the money would be good. They had friends where they could get this particular money from. I'd be very foolish not to take this kind of money because it was a very simple case. My testimony was the most important. If they could get to the witnesses, they could sway them with money. My testimony was the main one that they were interested in. If having me change my story or alter my story and especially get rid of the heavy pipe—

Q Did you do any of the things requested?

A No; I did not.

Q Did you report this conversation together with the miniphone tape to anyone?

A. I did.

Q Who did you report it to?

A I left Bickford's. We returned to the District Attorney's Office in the Municipal Building. I called my command headquarters. I advised them only that I had a conversation with the two defendants. I advised the District Attorney's Office of everything that transpired. The detective from the C.I.B. Division, Detective McBride was also advised of everything that transpired and the miniphone tape was returned to the District Attorney's Office.

Q Did you accept the offer of the money?

A I did not.

Q Was any money paid to you by either La Bello or Picirillo or anybody in their behalf?

A No, sir.

Q Did you get rid of the weapon that was requested that you get rid of?

A No, sir. I have both weapons here in my possession at this particular time.

Q Did you arrange with Picirillo or La Bello to meet again at a subsequent date?

A I was advised to think over their offer, I would be contacted the following week by an official from the Housing Authority who would tell me exactly what to do and how to go about getting rid of the evidence that this particular official, whoever he was, would assure me that nothing would happen to me in the future.

(WITNESS EXCUSED)

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

No. 1053-65

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS

against

ANTHONY LA BELLO, RALPH PICIRILLO, DEFENDANTS

INDICTMENT Filed July 14, 1965

The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of BRIBING CERTAIN PUBLIC OFFICERS committed as follows:

The defendants, acting in concert and each aiding and abetting the other, on or about March 20, 1964, in the County of Kings, did offer to give to WILLIAM A. SEWELL, a police officer, and a member of the Housing Authority of the City of New York, the sum of either one thousand dollars or fifteen hundred dollars in United States currency, with intent to influence the said WILLIAM A. SEWELL in his acts, decisions and duties as such police officer in and concerning the arrest and prosecution of the said defendants, ANTHONY LA BELLO and RALPH PICIRILLO, both of whom were arrested and in the custody of the said WILLIAM A. SEWELL on a charge of assault, and to cause the said WILLIAM A. SEWELL to alter and change his testimony to be given upon a hearing of the said charge against the said defendants and further that the said WILLIAM A. SEWELL would dispose of the weapons involved in the assault and alleged to be used by the defendants and further, to furnish to the said defendants the name or names of any and all witnesses against the said defendants concerned with the aforesaid charge of assault.

AARON E. KOOTA
District Attorney

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

—*vs*—

ANTHONY LABELLO and RALPH PICIRILLO, DEFENDANTS

SIRS: PLEASE TAKE NOTICE, that upon the annexed affidavit of HERBERT S. SIEGAL, Esq., duly sworn to the 26th day of November, 1965, the Indictment herein, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a Term thereof, to be held in Part I, in the Supreme Court, Kings County, at Supreme Court Building, Brooklyn 1, New York, on the 6th day of December, 1965, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order granting the above named defendants permission to inspect the Grand Jury minutes of the testimony upon which the Indictment herein was founded, or in the alternative, that this Honorable Court read the minutes and consider this Motion, as a Motion to dismiss the Indictment, based upon incompetent, illegal and insufficient evidence, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y. November 26th, 1965.

Yours, etc.,

HERBERT S. SIEGAL,
Attorney for Defendants,
Office & P.O. Address,
165 Broadway,
New York, N. Y. 10006.

To: HON. AARON E. KOOTA,
District Attorney, Kings County,
Municipal Building,
Brooklyn 1, New York

To: CLERK OF THE SUPREME COURT
Supreme Court Building
Brooklyn 1, New York

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

—*vs*—

ANTHONY LABELLO and RALPH PICIRILLO, DEFENDANTS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

HERBERT S. SIEGAL, Esq., being duly sworn, deposes and says:

That he is the attorney for the defendants above named and makes this affidavit upon information and belief for an Order granting permission to inspect the Grand Jury minutes of the testimony, upon which the Indictment herein is based or in the alternative that this Honorable Court read the minutes and consider this Motion as a Motion to dismiss the Indictment based upon incompetent, illegal and insufficient evidence.

That the defendants were not afforded a Hearing before the Criminal Court, Kings County, inasmuch that the arrest herein was made after the filing of the Indictment and the defendants have made reasonable effort to learn without inspection of the Grand Jury minutes as to what was testified to before the Grand Jury.

That heretofore, the defendants on or about the 14th day of July, 1965, were indicted for the crime of bribing certain Public Officers on or about the 20th day of March, 1965.

It is respectfully contended that the evidence presented to the Grand Jury, upon which the Indictment herein was found must have been illegal, incompetent and insufficient.

The presumtion of innocence prevails as much in the Grand Jury room as elsewhere, and the evidence before that body must be such as to clearly over come that presumtion before an Indictment can be properly found.

That the charges of Bribery contained in the Indictment arose out of a charge of Assault, which occurred on or about the 20th day of March, 1964.

Upon information and belief it appears that both defendants testified before the Grand Jury of Kings County, with respect to the Assault charges and other matters in connection therewith, and that both defendants were granted immunity by the District Attorney of Kings County, and the Grand Jury of Kings County, as to all matters arising out of the alleged Assault.

It therefore, appears that the Grand Jury, Kings County has indicted the defendants above named for a crime arising out of the subject matter for which these defendants were granted immunity, in violation of their Constitutional Rights against self-incrimination.

It therefore, appears that the evidence adduced before the Grand Jury was insufficient as a matter of law, and also, that illegal evidence was adduce before the Grand Jury upon which the Grand Jury filed an Indictment against the defendants herein.

That this Motion is made in good faith in order to enable your deponent to make a Motion to set aside the Indictment in view of the fact that your deponent and the defendants believe that the Grand Jury received other than legal evidence to such an extent and in such a manner as to invalidate the Indictment and that the legal evidence received by the Grand Jury was insufficient to warrant the finding of the Indictments, and this Motion is made in order that the Motion to set aside the Indictment, when made, may not rest, even in part, on surmise, but wholly upon disclosed and ascertained facts.

WHEREFORE, your deponent respectfully prays for an Order granting permission to inspect the Grand Jury minutes for which relief no previous application has been made.

Dated: November 26th, 1965.

/s/ Herbert S. Siegal

I, HERBERT S. SIEGAL, an attorney admitted to practice in the State of New York, am the attorney of Record for the defendants herein, and hereby affirm that the foregoing statement is true, under the penalty of perjury.

Dated: New York, N. Y., November 26th, 1965.

/s/ Herbert S. Siegal

IN THE SUPREME COURT OF THE STATE OF NEW YORK, KINGS COUNTY

(CRIMINAL TERM, PART III)
By MALBIN, J.

Indictment No. 1053/1965

PEOPLE OF THE STATE OF NEW YORK

vs.

ANTHONY LABELLO and RALPH PICIRILLO

MEMORANDUM—December 13, 1965

This is a motion to inspect the Grand Jury minutes upon which the indictment was founded, or, in the alternative to dismiss the indictment upon the ground that incompetent, illegal and insufficient evidence was received by the Grand Jury. The relief sought also included a direction that the testimony of the defendant be furnished to the attorney for the defense (the defendants appeared as witnesses before the Grand Jury).

The indictment was filed on July 14, 1965, charging the defendants with the crime of bribing certain public officers. The court has read the Grand Jury minutes

and is of the opinion that there was sufficient competent legal evidence before the Grand Jury to warrant the finding of the indictment. Among the contentions raised by the defense, that the defendants when they appeared as witnesses before the Grand Jury received full and extensive immunity that encompassed the present indictment, is without merit. The testimony furnished by them could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in this indictment. It is the view of this court that there has been full compliance with the requirements of Section 251 of the Code of Criminal Procedure.

The motion for an inspection of the Grand Jury minutes and for a dismissal of the indictment is denied. However, as to the request for the testimony given by the defendants to the Grand Jury, the District Attorney is directed to furnish a transcript thereof to the attorney for the above named defendants before the trial. Submit short order form in accordance with the within memo decision and effect proper service thereof.

/s/ David L. Malbin
J. S. C.

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

CRIMINAL TERM : PART 3

Ind. No. 1053—1965

Bribery

PEOPLE OF THE STATE OF NEW YORK

against

ANTHONY LABELLO, RALPH PICIRILLO, DEFENDANTS

Brooklyn, N. Y.

MINUTES OF DECEMBER 16, 1965

Before:

HON. DAVID L. MALBIN

Justice

Appearances:

BENJAMIN SCHMIER, ESQ.,
Asst. District Attorney
for the People

HERBERT S. SIEGEL, ESQ.,
for the Defendants

MARTIN BARRIS, CSR
Official Court Reporter

[fol. 2] THE COURT: Are you ready to proceed, Mr. District Attorney?

MR. SCHMIER: If your Honor please, the District Attorney moves for trial Indictment No. 1053 of 1965, People of the State of New York against Anthony Labello and Ralph Picirillo.

MR. SIEGEL: The defendants are ready.

THE COURT: So ordered. Advise the defendants, Mr. Clerk.

THE CLERK: Anthony Labello and Ralph Picirillo under Indictment No. 1053 of 1965, pursuant to Section 335-B of the Code of Criminal Procedure, you are in-

formed that if you have previously been convicted of any crime or offense, that fact may be established after your plea of guilty or possible conviction in this matter now before the Court, and you may be subject to different or additional punishment.

You are advised further, pursuant to Section 369 of the Code of Criminal Procedure, that if you desire to challenge the selection of any jurors, you must do so before the particular jurors are sworn.

Both sides are informed, pursuant to Section 373 of the Code of Criminal Procedure, that the people and the defendants each have a right to twenty peremptory challenges in the selection of the jury and two peremptory [fol. 31] challenges for each alternate juror. Furthermore, the defendants must unite and join in the exercise of their peremptory challenges.

(Voir dire examination of prospective jurors.)

(Jury duly selected and sworn.)

(By order of the Court two alternate jurors duly selected and sworn.)

THE COURT: You may proceed with your opening, Mr. Schmier.

(Opening by Mr. Schmier on behalf of the People.)

MR. SCHMIER: Ladies and gentlemen, the trial of a criminal case is divided into separate specific parts by the legislature, according to the rules of the Court. The first part is to pick the jury. Then we have the opening to the jury. Then we have the trial. Then we have summations and the charge, and that is the way it works. Now we are up to that point which we call the opening to the jury.

By opening to the jury, the rules hold that I must tell the jury what witnesses I intend to call and what I intend to prove, so that the jury can better follow when these witnesses are called and be better able to follow the case. I am about to open and tell you the people's case, what we intend to prove. I must caution you that what I tell you is not evidence. It is merely

[fol. 4] what I hope to prove, and the evidence will come from the lips of the witnesses, and it is only when a witness testifies to a fact that that fact is to be considered by the jury.

We will call as our first witness, Patrolman Sewell of the Housing Authority Police. He will tell you that on March 19, 1964, he was assigned to a housing project as a housing patrolman at Blake Ave. and Stone Ave., and that right in front of the housing project is a parking lot. At about 9:55 in the morning, Patrolman Sewell's attention was attracted by screaming, and he heard it coming from the parking lot, and he will testify that he ran towards the parking lot and saw these two men beating with weapons a man by the name of Jack Graham, who at that time was the president of the Westgate Painting Corp.

I won't go into Patrolman Sewell's testimony along these lines, but I will tell you that he will tell you that he apprehended these defendants; he placed them under arrest; he recovered the weapons; and that as part of his duties, he took these defendants for arraignment before a judge the following morning at 120 Schermerhorn St., which is known as the Felony Court, although it has, technically, a different name today.

[fol. 5] The defendants were arraigned before the Judge and the case was adjourned, and they were ordered remanded, and held in $1,000 bail.

MR. SIEGEL: I object to that and move to strike it out. I think it is all immaterial and has nothing to do with this bribery.

THE COURT: Yes, I believe your opening should be confined.

MR. SCHMIER: Now that he took them in the room, that is where the bribery took place.

THE COURT: All right.

MR. SCHMIER: After the Judge fixed the bail and remanded the defendants, Sewell will tell you that he took the two defendants from in front of the Judge, and he marched them back to what is known as the pen where you get the prisoners, and just as they reached the door, the defendant Picirillo, that is the gentleman sitting next

to Mr. Siegel, said in words or in substance—Mr. Sewell will give you what he remembers of the exact words—"Officer, you can make yourself a thousand or fifteen hundred dollars by helping us. Meet us tonight in Bickford's Restaurant at Atlantic and Flatbush Ave.," and that's all that was said there. The defendants were [fol. 6] taken in, except that Sewell said to these men, "Okay. I will meet you there."

Now I am not allowed under the law to tell you of any conversation that Sewell had with other people not in the presence of these defendants.

MR. SIEGEL: I object to that.

THE COURT: If you are not allowed to say it, don't refer to it.

MR. SCHMIER: I am going to say that he spoke to them.

THE COURT: The alleged complainant?

MR. SCHMIER: I can't say what he said, but he spoke to some people.

THE COURT: He spoke to some people.

MR. SCHMIER: Amongst the people he spoke to was Assistant District Attorney Edward Panzarella of Kings County; a Detective Sullivan was called, and Mr. Sewell will testify that they put upon him under his jacket a miniphone, which will be explained to the jury at length by one of our electronic experts, who will be called to the stand and explain to the jury what a miniphone is, and Mr. Sewell was instructed how to work it, and when he is ready to talk to the defendants, that he should—

MR. SIEGEL: Objected to.

[fol. 7] THE COURT: Overruled.

MR. SCHMIER: That he should start a certain gadget which will operate it, and Mr. Sewell went to Bickford's Restaurant to meet these two defendants and he was accompanied, although not with him; three other detectives from the district attorney's office parked themselves outside and inside of Bickford's Restaurant, and the one inside was pretending to be a customer, and the other two stood outside looking through the window, and we will show you that scene and we will show you also the spot in the restaurant where the defendants—Sewell

came into the restaurant; he waited a few minutes and then Picirillo and Labello came in. As Sewell sat down, he will tell you, he started the gadget operating. He will tell you that he spoke to the defendants, and that they offered him $1,000 to change his testimony, and that their lawyer would tell him what to say in court.

MR. SIEGEL: Just a moment, if your Honor please, so that the jury does not misunderstand; I was not their lawyer at that time.

MR. SCHMIER: That is true.

THE COURT: I am sure he meant no reflection on your integrity.

[fol. 8] MR. SCHMIER: Not even remotely, Judge. But the conversation will be miniphone recording, which Sewell took, and that will be part of the People's evidence, and the jury will hear, played back, the conversation between Sewell, Labello and Picirillo, and the jury will also be furnished with a transcript of the conversation, and you will hear played back that they offered Sewell $1,000 to change his testimony and to get rid of one of the weapons, and they said to him, "Do you think we can do anything with the witnesses?" There will be two civilian witnesses to the assault, and their names had been taken by Sewell, and in the conversation they said to him, "Can you give us the names of those witnesses," and Sewell, pretending to go along with them, you will hear him say to them, "What do you want to do with the witnesses?" They said, "Do you think we can reach them with a couple of hundred dollars each," and I won't repeat the entire conversation, but Sewell went along and drew them out, and there was talk about what had happened in the parking lot, and various other things which are not important right at this moment, but the entire conversation between Sewell and these two men will be shown and that in the Felony Court, the so-called Felony Court, they told him he can make $1,000 [fol. 9] or $1,500, and we will show you that they repeated the offer in the restaurant, which is right on the miniphone in their voices.

We will also, to complete our case, bring you the detectives who were there and saw Picirillo and Labello

meet with Sewell and talk with Sewell. We will get the detective who put the miniphone on Sewell and he will testify as to how he put it on. He will testify that he was there when Sewell came back, that he took it off, that he immediately played the recording, and that this is what he heard, and what you are hearing is the same recording, wire recording, that was on there at the time, and with all of those facts, we are going to ask you to find a conviction for bribery.

MR. SIEGEL: If your Honor please, pursuant to the provisions of the code, the defendants waive their opening.

THE COURT: Proceed, please. Call your first witness.

MR. SCHMIER: I call Mr. Sewell, your Honor.

PATROLMAN WILLIAM A. SEWELL, Shield 2632 of the Training Unit Housing Authority Police, called as a witness on behalf of the People, having first been duly sworn, testified as follows:

[fol. 10]

DIRECT EXAMINATION BY MR. SCHMIER:

Q Patrolman Sewell, are you a police officer attached to the Housing Police of the City of New York?

A Yes, I am.

Q How long have you been so attached?

A Four years.

Q In a short sentence or two, will you tell us what are the duties of a Housing Police Officer?

A They are the same duties as the N. Y. City Police Department. The only thing is we patrol the Housing Authority projects.

Q On March 19, 1964, were you engaged in your occupation as a police officer for the Housing Authority?

A Yes.

Q Patrolman Sewell, what was your specific assignment at or about 9:55 that morning?

A I was assigned to Brownsville Headquarters. It is located at 528 Stone Ave. That is one of the headquarters for the Housing Authority Police.

Q Did anything unusual occur which attracted your attention as a police officer on March 19, 1964, at or about 9:55 A.M.?

A Yes.

Q Tell the jury what, of an unusual circumstance, occurred.

A At approximately between 9:15 and 9:30, I was standing in the front of our headquarters. I saw a fellow [fol. 11] run across the street, and I saw another gentleman coming across the same street covered with blood. The first fellow, as he came out, he said he just saw two men assault the man who was covered with blood, and he pointed them out to me. I immediately—

Q Who was pointed out to you, if you now know.

A The two defendants.

Q Would you point them out and name them if you can.

A Anthony Labello and Ralph Picirillo.

Q How far were they from you at the time you first saw them?

A They were running through the project, which is across the street, and a little ways into the project.

Q For the purposes of this case, it is sufficient if you tell us now, did there come a time when you apprehended these two defendants?

A Yes.

Q Did there come a time when you placed them under arrest, charged with the assault of the man whom you saw bleeding?

A Yes.

Q Do you now know the name of the man who was bleeding?

A Yes.

Q What was his name?

A Jack Graham.

Q In conjunction with the arrest of these defendants, did you recover any weapon?

A Yes, I did.

[fol. 12] Q What kind of weapons did you recover?

A I recovered a tire iron, which is used to—

MR. SIEGEL: I object to that.

THE COURT: Don't tell us what it is used for. You recovered a tire iron.

THE WITNESS: A tire iron and an 18 inch pipe which is a lug wrench, a large lug wrench.

Q Patrolman Sewell, I show you these two objects, a tire iron and lug wrench, and I ask you if you recognize these two objects.

A Yes.

Q Did you make any identifying marks on these items which would cause you to answer in the affirmative?

A Yes, my initials are carved on there.

Q Now that you have refreshed your recollection, what are these objects as you look at them?

A They are a tire iron and a lug wrench.

Q And are these the two weapons that you recovered in connection with the arrest of these defendants?

A Yes.

MR. SCHMIER: Your Honor, I offer these as People's Exhibit 1 and 2 in evidence.

MR. SIEGEL: I object to it on the ground that it has not been connected with the defendants.

THE COURT: That is so. Explore that further.

[fol. 13] Q Did there come a time—

THE COURT: Just a moment. Take them separately. Are you offering the tire iron?

MR. SCHMIER: Yes, your Honor.

THE COURT: That will be marked People's Exhibit 1 for identification.

(Tire iron marked People's Exhibit 1 for identification.)

Q Only specifically with respect to this tire iron, did there come a time when you showed this tire iron to either one of the two or both of the defendants?

A Yes.

MR. SIEGEL: I object to it.

THE COURT: Overruled.

MR. SIEGEL: May we approach the bench if your Honor please.

THE COURT: Yes. I might at this time, Mr. Foreman and ladies and gentlemen, make this observation. There will be times during the trial, as you have observed, when the attorneys will approach the bench and we will have a discussion, and you can't hear it, and it is done deliberately so that you cannot hear it because we are discussing matters of law which are no concern of yours at this time.

(The following took place at the bench without the [fol. 14] hearing of the jury.)

THE COURT: As to this tire iron, you are about to ask him whether he exhibited this tire iron to the defendant or either one of them?

MR. SCHMIER: Yes your Honor.

THE COURT: To whichever one you attribute physical possession of the alleged particular exhibit.

MR. SCHMIER: Yes your Honor.

THE COURT: What is your objection?

MR. SIEGEL: My objection is that the District Attorney has gone on record as saying that he will not offer any admissions or confessions by the defendant. This is certainly an admission.

MR. SCHMIER: This is part of the previous assault case.

THE COURT: I will sustain the objection. As a matter of fact, all you have to establish as a predicate or as a foundation to the bribery charge is that there is some pending matter in which this officer's opinion or his determination or his actions were attempted to be influenced by this offer for him to withhold the doing of his duty, and you have a right to show that.

Now you have before the jury that there was an assault charge. I will permit you to show that there was [fol. 15] a charge made against them, and I am not indicating the manner of your proof, but it is sufficient as a predicate for this charge, if there was a complaint and these two defendants are identified as being those who were arrested and charged with the complaint, and if the complaint sets forth the fact that these two instruments that you speak of were part of the complaint, I am going

to allow it. I am saying that now. He is absolutely right. You don't have to get the admission to the main crux of the case.

MR. SCHMIER: When we were talking about confession, we were talking about bribery admission.

THE COURT: That is out. Mr. Siegel, I merely made my observation to clarify the record, but of course you are not bound by my way of thinking. You realize that.

MR. SIEGEL: Of course.

(In open court.)

BY MR. SCHMIER:

Q Did there come a time, Patrolman Sewell, that you placed the defendants under arrest?

A Yes.

Q What was the charge under which you arrested them?

A Felonious assault and 1897 of the Penal Law.

Q What was the basis of your charge of 1897 of the Penal Law?

A Tire iron and the lug wrench.

[fol. 16] MR. SIEGEL: I object to that. That is not the basis of the complaint.

THE COURT: First please offer the lug wrench in evidence so that it can be marked People's Exhibit 2 for identification.

MR. SCHMIER: I offer the lug wrench as People's Exhibit 2 for identification.

(Lug wrench marked People's Exhibit 2 for identification.)

THE COURT: I think, Mr. Siegel, the answer to the question propounded to this witness was the basis of the assault complaint and also the 1897. You say that these two exhibits for identification are not the basis of the 1897 charge. Is that the fact? Do you have the original complaint here?

MR. SCHMIER: No, I don't have the original complaint.

THE COURT: If it is a question, we can send for it. Is there any question that it was not incorporated in the complaint in the Criminal Court?

MR. SIEGEL: May I ask a question of the witness?

THE COURT: Surely.

VOIR DIRE EXAMINATION BY MR. SIEGEL:

Q The complaint with respect to the 1897, was that based on what someone else told you?

[fol. 17] A I don't understand you.

Q You say that part of the complaint was felonious assault; is that right?

A Yes.

Q And that was based on what someone told you, is that right? You yourself were not the complainant.

A No.

Q You were not hit.

A No, I was not.

Q So that the assault was based on what someone else told you, are we correct?

A Yes.

Q What about the 1897, was that based on what someone else told you?

A The weapons used, yes. They were used in the assault.

Q But the complaint was based on what someone else told you, is that right? In other words, you didn't charge these defendants or either of them with a violation of Section 1897 merely because they had this weapon in their possession or this instrument in their possession?

A No.

Q In and of itself, it is not a weapon unless it is used.

THE COURT: Now you are going into a matter of law that I don't think he is required to answer.

Q Without anything else before you, would you arrest any person that carries this piece of property?

A No.

Q So that the basis of the complaint with respect to [fol. 18] the 1897 was also on what someone else told you, is that right?

THE COURT: That question is objectionable. I don't want to inject myself. The District Attorney is here to do that.

MR. SIEGEL: May I ask one other question.

Q Did you see these instruments being used by the defendants?

A No.

MR. SIEGEL: I object to it.

MR. SCHMIER: On your ruling of law, it is not the question of the nature of the complaint but merely that a complaint was drawn for 1897. I now have an exact copy of the original complaint in the Felony Court, and I would like your Honor's permission to question Patrolman Sewell on it.

THE COURT: I will exclude that because it contains matter that is prejudicial. However, it am going to overrule your objection, Mr. Siegel, for the reason that even though these are innocuous objects that may be used in commonplace by everyone, he had information which gave him probable cause to believe that these were the objects of some illegal acts, and that makes those instruments illegal, and that will be my ruling.

MR. SIEGEL: Very well. If your Honor please, may I see the complaint?

[fol. 19] THE COURT: Yes.

MR. SIEGEL: If your Honor please, I respectfully except.

THE COURT: Exception noted. I understood you to say that you made out a short affidavit which was based upon information that you received from a person. Is that correct?

THE WITNESS: Yes, Sir.

BY MR. SCHMIER:

Q And also by virtue of the fact that you found these two exhibits that have been marked for identification.

A Yes.

Q And then you incorporated the charge of assault and a violation of Section 1897 of the Penal Law against these two defendants, is that correct?

A Yes, sir.

THE COURT: Are you offering them now?

MR. SCHMIER: Yes, I offer the tire iron as Exhibit 1 in evidence, and the lug wrench as People's Exhibit 2 in evidence.

THE COURT: They will both be received, to which you object, I assume.

MR. SIEGEL: I object upon the ground that the police officer did not have probable cause because it has not been established as yet by the police officer that the [fol. 20] information he received came from a reliable and confidential informer upon whom he could rely.

THE COURT: Objection overruled.

MR. SIEGEL: I respectfully except.

(People's Exhibits 1 and 2 for identification received in evidence and so marked.)

BY MR. SCHMIER:

Q Patrolman Sewell, you drew this complaint against these defendants.

A Yes sir.

Q And you were the arresting officer.

A Yes, sir.

Q Did there come a time when these defendants were arraigned before a judge in the Felony Court.

A Yes, sir.

Q Did there come a time when the arraignment took place and was concluded?

A Yes, sir.

Q Tell us what happened after the arraignment was concluded. What, if anything, did you do with respect to these defendants and what, if anything, did they say or do to you?

A At the arraignment, the two defendants were placed on—

MR. SIEGEL: I object to that. The question was after arraignment.

THE COURT: After the arraignment. Do you understand that?

[fol. 21] THE WITNESS: Yes, your Honor.

THE COURT: After they were being returned to the pen.

THE WITNESS: Yes, Sir. After the arraignment I was returning these two defendants to the Correction Offices, the cells located in the rear of the court. At the doorway leading from the court, one of the defendants—

Q Which one, if you know.

A Ralph Picirillo.

Q Will you point out Ralph Picirillo.

A The gentleman seated next to Mr. Siegel.

Q Proceed.

A He asked me if there was something I could do for them as far as changing my story regarding what happened.

MR. SIEGEL: I object to that. May we approach the bench.

(The following took place at the bench without the hearing of the jury.)

MR. SIEGEL: I object to it upon the grounds that even though it may be part of the res gesti, it is also an admission and confession, and for that reason I object to it.

THE COURT: Objection overruled.

MR. SIEGEL: I respectfully except.

[fol. 22] (In open court.)

BY MR. SCHMIER:

Q What else did they say, officer?

A They asked me if it was possible to get rid of one of the lug wrenches and they offered me a sum of money.

Q Would you try to give us the exact conversation as you recall it, instead of a conclusion.

THE COURT: He stated that they asked him to change the story. Is that what they asked you?

THE WITNESS: Yes, Sir.

THE COURT: That is Ralph Picirillo you are talking about.

THE WITNESS: Yes, Sir.

THE COURT: And also to get rid of one of the what?

THE WITNESS: Of the instruments used.

THE COURT: Was there anything else said?

THE WITNESS: Yes, they asked me—

MR. SIEGEL: I object to that.

THE COURT: Overruled.

MR. SIEGEL: I object to the "they," if your Honor please, unless he tells us who.

THE COURT: You are correct in that. Objection is sustained. Tell us what each one said. When you refer to "they," if they both spoke together you can say they [fol. 23] both did. But tell us what each one said.

A Ralph Picirillo asked me to change my story to get rid of one of the instruments. He also asked me to meet him at a particular restaurant, Bickford's Restaurant. Anthony Lobello also spoke regarding—

MR. SIEGEL: I object and move to strike that out.

THE COURT: What did he say?

THE WITNESS: Would I meet them at Bickford's Restaurant that evening.

BY MR. SCHMIER:

Q Did they give you any particular time?

A He said about 8:30.

Q You said they offered you a sum of money. What was the sum of money discussed?

A It was $1,000 or $1,500.

THE COURT: Who said something about $1,000 or $1,500?

THE WITNESS: Ralph Picirillo.

THE COURT: What did he say about $1,000 or $1,500? What did he say would be done?

THE WITNESS: If I changed my story, got rid of one of the instruments, he would give me $1,000 or $1,500.

BY MR. SCHMIER:

Q At the time of the arrest, had you secured the names of any witnesses to the circumstances which had taken place.

A Yes, I had.

[fol. 24] Q Was there any conversation between you and the defendants or either one of them as to these witnesses.

A Ralph Picirillo wanted the names of the witnesses so that they could get to the witnesses with some money, as he stated to me.

Q Did you then return the prisoners to where they were remanded?

A Yes.

Q What, if anything, did you do after that?

THE COURT: Before that, excuse me for injecting —before that, was anything said to you as you say you were leading these defendants back to the pen? Did Anthony Lobello say anything to you? I am talking about after the arraignment in the Court.

THE WITNESS: Anthony Lobello was the one— Ralph Picirillo suggested Bickford's and Anthony Lobello mentioned Bickford's Restaurant and he named the place where we should meet.

THE COURT: You mean by that the address, the location?

THE WITNESS: Yes, Sir.

BY MR. SCHMIER:

Q An was that location Flatbush Ave. and Atlantic Ave. in Brooklyn?

A Yes.

Q What did you do after the defendants were remanded, if anything?

A I immediately notified the district attorney's office.

[fol. 25] Q Don't tell us what you said, but did there come a time after that when you went to the district attorney's office?

A Immediately upon leaving the courtroom, I went directly to the Brooklyn district attorney's office.

Q Whom did you see there, if anybody?

A Mr. Panzarella.

THE COURT: Is he an Assistant District Attorney?

THE WITNESS: Yes, Sir.

Q What, if anything, took place after you spoke to Mr. Panzarella?

A I advised—

MR. SIEGEL: I object to that.

THE COURT: Overruled.

Q Did you speak to someone else?

A Yes, I spoke to Detective Jim Fallus and Detective McBride.

Q Did you see a Detective Sullivan there?

A Detective Sullivan was in the district attorney's office.

THE COURT: Where were Detective Fallus and Detective McBride?

THE WITNESS: They were originally in the courtroom when I arraigned the two defendants.

Q Did you speak to them in or near the courtroom?

A I spoke to them outside of the courtroom.

Q When you went to the district attorney's office, were you accompanied by the officer or either one of the two?

[fol. 26] A I was accompanied by Detective McBride and Detective Jim Fallus.

Q Then, you tell us, you spoke to Assistant District Attorney Edward Panzarella?

A Yes, sir.

Q What happened after you spoke to them? Withdrawn. Was the subject of your conversation that matter—

MR. SIEGEL: I object to that.

THE COURT: Objection sustained.

Q What happened after you spoke to the Assistant District Attorney and the detectives?

A They told me to keep the meeting—

MR. SIEGEL: Objected to.

THE COURT: Sustained. Don't tell us what they told you. As a result of a conversation, what did you do next?

THE WITNESS: As a result of the conversation I met with the two defendants.

Q I show you this miniphone and ask you if you saw it on a prior occasion.

A Yes.

Q When, and what were the circumstances.

THE COURT: Ask him directly. Were you set up with that?

THE WITNESS: Yes, Sir.
THE COURT: Did you wear that?
THE WITNESS: Yes, I did.
[fol. 27] THE COURT: Mark it for identification.

(Miniphone equipment marked People's Exhibit 3 for identification.)

Q When you were set up with that, were you given instructions in its operation?
A Yes, sir.
Q Did you follow those instructions?
A Yes, I did.
Q What, if anything, took place later that evining.
A I met with the two defendants at Bickford's Restaurant.
Q What time approximately did you get to Bickford's Restaurant?
A Approximately 8:30.
THE COURT: That is on Flatbush Ave., you said, and where?
THE WITNESS: It is Flatbush Ave. Extension, directly across the street from the Fox Theatre. It is Flatbush Ave. and Fulton St.
MR. SCHMIER: Your Honor, I have shown this photograph to Mr. Siegel, and I believe he has no objection to its introduction so that the jury can follow the scene. It depicts an outside picture.
THE COURT: Have you seen that?
MR. SIEGEL: Yes, and I have no objection.
MR. SCHMIER: I offer it as People's Exhibit 4 in evidence.
THE COURT: Mark it in evidence.
[fol. 28] (Photograph received in evidence and marked People's Exhibit 4.)

MR. SCHMIER: And I also offer in evidence a photograph of the interior as People's Exhibit 5.
THE COURT: It will be received as People's Exhibit 5 in evidence, the interior.

(Photograph of the interior of Bickford's Restaurant marked People's Exhibit 5 in evidence.)

BY MR. SCHMIER:

Q Approximately what time did you say you got to the restaurant?

A Approximately 8:30.

Q Were the two defendants there when you arrived.

A No.

Q Did they arrive subsequently after your arrival.

A Yes.

THE COURT: What day was this; on the 19th that you arrived at Bickford's?

THE WITNESS: No Sir. The 20th.

THE COURT: 8:30 in the morning or the evening?

THE WITNESS: The evening, Sir.

Q Just to keep the sequence, you had arraigned these defendants earlier that day on March 20th, is that right?

A Yes, sir.

Q And this was the same evening of the day of the [fol. 29] arraignment?

A Yes, sir.

Q And, according to your testimony, they had spoken to you earlier that morning, is that right?

A Yes, sir.

Q March 20th?

A Yes.

Q And you are now meeting them at 8:30 or approximately that time in the evening of the same day.

A Yes, sir.

Q Now approximately, not exactly if you can't give it to us, but approximately how long after you arrived did either one of the two defendants arrive?

A The two defendants arrived at approximately 8:40 P.M.

Q Did they arrive together?

A Yes.

Q Officer, I show you People's Exhibit 4 and I ask you what that scene represents to you.

THE COURT: It is already in the record what it represents, the exterior of Bickfords on Flatbush Extension and Fulton St.

Q Is this the restaurant you are talking about when you say you went to Bickford's Restaurant at Fulton St. and Flatbush Ave.?

A Yes.

Q Patrolman, when you went to this meeting, were you accompanied by anybody?

A Yes, I was.

Q Who accompanied you?

A Detective John Sullivan, Detective McBride, Detective Romando and Detective D'Augusto and Detective Houston.

[fol. 30] Q Did you go into the restaurant?

A Yes, I did.

Q I want you to look at People's Exhibit 5, and I ask you to step down if you have to, and could you point out where you were seated if that location is shown on People's Exhibit 5.

THE COURT: Is the location on there?

THE WITNESS: Yes, Sir.

THE COURT: You were seated at a table, you say.

THE WITNESS: Yes, Sir.

THE COURT: Put an X indicating the table where you were sitting.

THE WITNESS: Yes, Sir.

(Complying with request.)

THE COURT: Let the record indicate that the witness marked an X at the table where he says he was sitting, which is indicated on People's Exhibit 5 in evidence.

BY MR. SCHMIER:

Q Partolman Sewell, at the time that you were sitting at that table, did Labello and Picirillo join you?

A Yes they did.

Q Was anyboy else seated at the table?

A No, sir.

Q Was your miniphone in operation at that time?

A Yes, sir.

Q To the best of your recollection, what if anything [fol. 31] did the defendants say to you at the table and what did you say to them.

THE COURT: Tell us what each one said, if anything.

THE WITNESS: Ralph Picirillo asked me to give them the names of the two witnesses, so that they could get to them with some money, to change my story and to get rid of one of the instruments. Anthony Labello also spoke. He wanted me to change my story and give them the names of the witnesses and get rid of one of the pieces of evidence.

Q Was there any mention of money.

A Yes, sir.

Q What money was mentioned, if any.

A G-note a thousand dollars.

MR. SIEGEL: May we know by whom, sir.

THE COURT: Which one mentioned anything about money?

THE WITNESS: Both, your Honor.

THE COURT: Both said that they would give you a G-note?

THE WITNESS: Yes, Sir.

THE COURT: They would each give you a G-note.

THE WITNESS: No, Sir. It was a G-note. One spoke and said, "We will give you a G-note," and the other one said, "We will give you a thousand dollars, a G-note." It was one G-note.

[fol. 32] BY MR. SCHMIER:

Q Was there any money mentioned with respect to the witnesses, and what if anything were you to do?

A They stated that they wanted the names of the two witnesses to get to them with some money. They assured me that if I gave them this information, that nothing would happen to me, that I would not get myself into any type of trouble, that they had high officials in the N. Y. Housing Authority who would guarantee that nothing would happen to my job.

Q Did there come a time when that meeting broke up?

A Yes, it did.

Q Did you at any time indicate to them or give them to believe that you were going along with their offer?

A Yes, I did.

Q Had you any intent of going along at that time with their offer?

MR. SIEGEL: I object to that.

THE COURT: Objection overruled.

A No, sir.

Q What, if anything, did you do after you left the meeting? Where, if anyplace did you go?

A I returned to the district attorney's office in the Municipal Building.

Q When you returned, were you still wearing the miniphone?

A Yes, sir.

[fol. 23] Q What, if anything, happened to the miniphone in your presence.

A It was removed.

Q By whom?

A By Detective John Sullivan.

Q Did he remove it in your presence?

A Yes, he did.

Q Did you remain with Detective Sullivan while anything was done with the miniphone?

A Yes.

Q What, if anything, was done with the miniphone?

A It was turned off and it was played back.

Q Did you hear the playback?

A Yes, I did.

Q Did you hear the parties speaking?

A Yes, I did.

Q Were those the voices of Labello and Picirillo?

A Yes, sir.

Q And was it the conversation you had had with them in the restaurant.

A Yes, sir.

Q Was it the exact words that you had used and the exact words that they had used as best you could recall?

A Yes, sir.

MR. SCHMIER: Your witness.

CROSS EXAMINATION BY MR. SIEGEL:

Q Did you testify before the Grand Jury?

A Yes, sir.

MR. SIEGEL: May we have the Grand Jury testi-
[fol. 34] mony of this witness?

MR. SCHMIER: I have here the original Grand Jury minutes of March 22nd, 1965, of this witness confined to pages 4 to 13.

THE COURT: Mark it People's Exhibit 6 for identification.

(Grand Jury testimony of Patrolman Sewell marked People's Exhibit 6 for identification.)

THE COURT: Are there any other statements made by this witness?

MR. SCHMIER: No, the various detectives have their notes. I have no other statement of this witness.

BY MR. SIEGEL:

Q Officer, were you at any time interrogated by the district attorney's office in connection with this case?

A Interrogated?

Q Questioned.

A Yes.

Q You sat down with an Assistant District Attorney and told him what happened, did you not?

A Yes, sir.

Q Whom did you talk to?

A I have spoken to Assistant District Attorney Panzarella.

Q At the time you were talking to him was there anyboy else in the room?

A Yes.

Q Was anybody taking any notes in the room?

[fol. 35] A I don't know.

Q Did you see anybody—

THE COURT: Do you recall whether there was a recorder or stenographer there while you were being interrogated by Mr. Panzarella; do you recall?

THE WITNESS: There was no stenographer, no.

THE COURT: Do you know whether anybody was taking down any notes of any kind? That's what the lawyer wants to know.

THE WITNESS: When I spoke to Mr. Panzarella, no Sir.

BY MR. SIEGEL:

Q When you were questioned by Mr. Panzarella, you gave him answers to the questions, is that right?
A I was not asked. You say answers to questions.
Q Did he ask you any questions?
A Yes, he did.
Q Did you make any answers?
A Yes, I did.
Q Did you see him have a pad in front of him?
A I believe so.
Q Did he make notations on the pad?
A I believe so.

MR. SIEGEL: I ask for those notations if your Honor please, if they reflect the statements of this witness.

THE COURT: Do you have it in the file, Mr. Schmier?

MR. SCHMIER: I don't know, your Honor.

THE COURT: Supposing we take a brief recess and [fol. 36] you get those notes if you have them, and you might as well get any other notes of any other assistant or police officer.

Mr. Foreman and Ladies and Gentlemen of the Jury, we will take a brief recess for the reason you have observed here. We will give them an opportunity to search for the papers. I must caution you, please keep your minds open and don't form any opinion with respect to the guilt or innocence of these defendants or either of them.

(Jury left courtroom and recess taken.)

(Jury returned—trial continued.)

THE COURT: Do you waive the calling of the roll, Mr. Siegel?

MR. SIEGEL: Yes, your Honor.

THE COURT: All the jurors are present and the defendants are present in Court with their counsel and the Assistant District Attorney is present.

Mr. Siegel, I have been advised that the District Attorney wishes to compile all the statements for you, and he is not sure about one particular statement. So I think we will take a recess until tomorrow morning.

Mr. Foreman and Ladies and Gentlemen of the Jury, we will recess until tomorrow morning. I must caution you, please don't discuss this case among yourselves or with anyone else and don't form any opinion about it. [fol. 37] Permit nobody to talk to you about this matter, and in the event that there is any release, news release about this case, I caution you not to read the subject matter.

Now I know it is pretty hard for people to ignore newspaper reports if they should appear. I know nothing about that, but I want you to be very careful because you cannot permit any extraneous matters to enter into your deliberations if this case is submitted to you for your determination. If anybody at home tries to talk to you about the case, of course it is very likely they will ask you what kind of case you are on, and you may tell them, but please don't discuss any of the matters because you may get some thoughts, and there may be something they say to you which you may not be able to distinguish at a later time as to whether it is testimony or something that was told you. So please heed my admonition. It is very important that everybody get a fair and impartial trial, and that means that it must be determined on the evidence and the law. So please heed my admonition. You may go now and return here tomorrow morning at 10 o'clock.

(Jury left courtroom and trial adjourned to Dec. 17, 1965 at 10:00 A.M.)

(Defendants remanded.)

Plea

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

CRIMINAL TERM : PART III

Ind. No. 1053—1965

Bribery

PEOPLE OF THE STATE OF NEW YORK

against

ANTHONY LABELLO, RALPH PICIRILLO, DEFENDANTS

Brooklyn, N. Y.

MINUTES OF DECEMBER 17, 1965

Before:

HON. DAVID L. MALBIN

Justice

Appearances:

BENJAMIN SCHMIER, ESQ.,
Asst. District Attorney
for the People

HERBERT S. SIEGEL, ESQ.,
for the Defendants

MARTIN BARRIS, CSR
Official Reporter

[fol. 2] (During the course of trial, the following occurred.)

MR. SIEGEL: If your Honor please, at this time the defendants desire permission to withdraw their plea of not guilty heretofore entered, and offer to plead guilty to an attempt to commit the crime of bribery, to cover and satisfy this indictment and all other matters pend-

ing and known to the district attorney of Kings County as of this date.

THE COURT: What does the district attorney have to say?

MR. SCHMIER: That plea, your Honor, is acceptable to the People, and we accept that part of the offer in which any matters known to the People may be covered at this time.

MR. SIEGEL: That is what I said—known as of this date.

THE COURT: Anthony Labello, will you please rise.

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Is Mr. Herbert S. Siegel your attorney?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Did you hear him now make an application to the Court, in which he sought permission to withdraw the plea of not guilty that you had heretofore [fol. 3] entered in this case, and requested permission to interpose a plea of guilty to the crime of an attempt to commit the crime of bribery in full satisfaction of the indictment, and also to cover any pending matters of which the district attorney has any knowledge. Do you understand that?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Is that clear to you?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: You understand if the Court accepts your plea of guilty to the crime of an attempt to commit the crime of bribery, that indicates that you are pleading guilty to the fact that you did offer the bribe to the police officer that you heard testify in this case thus far; is that clear?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: You know that that is a felony; you understand that committing the crime of attempted bribery is a felony; you understand that.

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Did you ask your lawyer to make that offer of guilty to attempt to commit the crime of bribery?

DEFENDANT LABELLO: Yes, Sir.

[fol. 4] THE COURT: And you are doing that of your own free will?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Now, is it a fact that on the day you are alleged to have made this offer to bribe this police officer of the Housing Authority, Patrolman Sewel; did you make such an offer?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: Who was with you when you made this offer?

DEFENDANT LABELLO: Ralph Picirillo.

THE COURT: The two of you were together?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: And the officer said that you made an offer to him that you should destroy some of the evidence.

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: And also to advise you of certain witnesses, so that they may attempt to be intimidated, or that you might reach them to affect their testimony; was that the purpose of your offer?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: There is no question about that. You freely and openly in this Courtroom admit that you [fol. 5] attempted to bribe this officer.

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: If I accept this plea, do you understand that I want to ascertain from you, did your lawyer in any way promise you what sentence I would impose upon you?

DEFENDANT LABELLO: No, your Honor.

THE COURT: Did the district attorney promise you what the sentence in this case would be?

DEFENDANT LABELLO: No, your Honor.

THE COURT: You understand that bribery calls for ten years imprisonment, and attempted bribery calls for half of that; but the Judge has a right to impose a sentence within the scope of what the law provides; that is, anything from one up to five years. The Judge can suspend sentence if he wants to. He can give you any figures within that scope; he can give you one to two, or two to four, anything that he thinks is applicable considering your background; do you understand that?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Under those conditions, do you wish to plead guilty to the crime of attempted bribery?

DEFENDANT LABELLO: Yes, your Honor.

[fol. 6] THE COURT: I have not indicated to you what I am going to do with you by way of sentence, have I?

DEFENDANT LABELLO: No, your Honor.

THE COURT: Because now is the time, if you don't want to plead guilty, it is a matter of your own choosing; you can stand trial and continue on with it, and the jury will know nothing about this. The jury is being detained in the jury room while this proceeding is taking place. Do you understand that?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: Under the circumstances, you say that it is your own desire to plead guilty to the crime of an attempt to commit the crime of bribery.

DEFENDANT LABELLO: Yes, Sir.

THE COURT: And with the understanding that there has been no promise as to the sentence that will be imposed upon you; is that clear?

DEFENDANT LABELLO: Yes, Sir.

THE COURT: You, Ralph Picirillo, you heard your lawyer, Mr. Siegel, make an offer in your behalf that he desires to withdraw your plea of not guilty to the indictment and plead guilty to the crime of an attempt to commit the crime of bribery; do you understand that?

[fol. 7] DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: Did he do that in accordance with your wishes? Did you ask your lawyer to do that in your behalf?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: And you want to plead guilty to an attempt to commit the crime of bribery.

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: And you are doing that of your own free will.

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: Nobody is forcing you to plead guilty.

DEFENDANT PICIRILLO: No, your Honor.

THE COURT: And you are pleading guilty because you are guilty of the offer to bribe this police officer who appeared in open Court as a witness against you; is that correct?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: And is it a fact that you were present with your companion, Labello, when the two of you sought to bribe this officer?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: And to forget about the exhibits in [fol. 8] this case; that is, the lug wrench and the tire iron?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: Did you hear Labello say that he and you were present when the two of you offered the officer $1,000 in order to forget about the weapons in this case?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: And also to give you the names of the witnesses?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: And that is what you attempted to do; is that right?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: The money was not actually passed.

DEFENDANT PICIRILLO: No, your Honor.

THE COURT: Did your lawyer or the district attorney make any promise to you as to what the sentence will be in this case?

DEFENDANT PICIRILLO: No, your Honor.

THE COURT: You understand that by pleading guilty, you are admitting to the facts in the indictment, and also, you are admitting that what the officer said was true, and is it a fact that it is true?

DEFENDANT PICIRILLO: Yes, your Honor.

[fol. 9] THE COURT: Now, were you present with Labello in Bickford's restaurant that night on March 20th?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: And is that where you were going to go through with this offer and bribe the police officer?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: It was your intention to do so with Labello.

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: Has there been any promise made to you by anyone in this case as to what sentence I will impose upon you?

DEFENDANT PICIRILLO: No, your Honor.

THE COURT: I have not made any promise to you, have I?

DEFENDANT PICIRILLO: No, your Honor.

THE COURT: If this plea is accepted, you are to understand that there are, as I indicated to your co-defendant, that I have, as the Judge, the right to impose a sentence anywhere within the span of up to five years; do you understand that?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: I have a right to give you the sen-
[fol. 10] tence that I think your background and the circumstances in this case would warrant; do you understand that?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: Of course, consideration should be given, and probably will be given to the defendant who pleads guilty and admits his crime before a jury establishes that fact. Do you understand that?

DEFENDANT PICIRILLO: Yes, your Honor.

THE COURT: I want to make it crystal clear that I never indicate what my sentence is going to be; but in view of the fact that I read the record over as to a prior plea, and I am saying this for your information, Mr. District Attorney, as well as the defendant, this Court has no intention whatsoever—so here is the time for you now to change your mind if you so desire—there was an alleged indication that you were going to get a sentence that would run exactly concurrently with the sentence that you are now serving on the assault. Do you understand? That would be within that time. Do I make it clear?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: Any sentence that I am going to impose is going to start after you complete the other sen-

[fol. 11] tence. Is that clear to you?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: Is that clear to you, Labello?

DEFENDANT LABELLO: Yes, your Honor.

THE COURT: Both defendants answer in the affirmative. I want you to know that. I don't want any misapprehension. I don't want you to go along any assumption that I am going to give you the same sentence you got and let it run concurrently with the other. Do you understand that?

DEFENDANT PICIRILLO: Yes, Sir.

DEFENDANT LABELLO: Yes, Sir.

THE COURT: I may take into consideration the fact that you are already serving time on a crime that is practically the predicate of this crime here. Do you understand?

DEFENDANT PICIRILLO: Yes, Sir.

THE COURT: I want it clearly understood. All right. Under the circumstances, Mr. Clerk, both of these defendants having indicated their desire to plead guilty to an attempt to commit the crime of bribery, and that plea being acceptable to the district attorney, after you advise them under Section 335-B, the Court will accept [fol. 12] the plea to the crime of attempt to commit the crime of bribery.

THE CLERK: What is your name?

DEFENDANT PICIRILLO: Ralph Picirillo.

THE CLERK: What is your name?

DEFENDANT LABELLO: Anthony Labello.

THE CLERK: Do you understand English?

DEFENDANT LABELLO: Yes, sir.

DEFENDANT PICIRILLO: Yes, sir.

THE CLERK: Ralph Picirillo and Anthony Labello, under Indictment No. 1053 of 1965, pursuant to Section 335-B of the Code of Criminal Procedure, you are advised that if either of you has been convicted of any crime or offense, that fact may be established after your plea of guilty in this action now before the Court, and you may be subjected to different or additional punishment.

Ralph Picirillo and Anthony Labello, having been so advised, do you now both withdraw your plea of not guilty to Indictment No. 1053 of 1965, and do you now plead guilty to the crime of attempt to commit the crime of bribery, a felony, that plea to cover Indictment No. 1053 of 1965, and any pending matters that the district attorney has knowledge of; do you so plead?

[fol. 13] DEFENDANT PICIRILLO: Yes, sir.

DEFENDANT LABELLO: Yes, sir.

THE CLERK: Do both of you waive the fixation of a definite date for sentence?

DEFENDANT PICIRILLO: Yes, sir.

DEFENDANT LABELLO: Yes, sir.

MR. SIEGEL: If your Honor pleases, on the question of date, in view of the fact that there is a probation report, which is as recent as about a month ago when it came before Mr. Justice Gittelson, and at the request of the defendants, could we have an immediate sentence? By immediate, I mean next week.

THE COURT: I will advise the Probation Department. They are not having any sentences at all during Christmas week. They are having it right before, but I am going away, and I will therefore set this sentence down for January 5, 1966.

(Defendants sworn and pedigrees taken.)

(Defendants remanded.)

IN THE SUPREME COURT OF THE
STATE OF NEW YORK, KINGS COUNTY

CRIMINAL TERM : PART 3

Ind. No. 1053—1965

PEOPLE OF THE STATE OF NEW YORK

against

RALPH PICIRILLO, ANTHONY LA BELLO, DEFENDANTS

Brooklyn, N. Y.

MINUTES OF JANUARY 19, 1966

Before:

HON. DAVID L. MALBIN

Justice

Appearances:

AARON E. KOOTA, ESQ.,
District Attorney
for the People

HERBERT S. SIEGEL, ESQ.,
for the Defendant

MARTIN BARRIS, CSR
Official Court Reporter

[fol. 2] THE CLERK: Indictment No. 1053 of 1965, Ralph Picirillo and Anthony La Bello, represented by Mr. Herbert Siegel. The district attorney, Mr. Aaron E. Koota, is present.

Ralph Picirillo and Anthony La Bello, the sentence of the Court is about to be pronounced upon you. If you have any legal cause or any other reason why sentence of the Court should not be pronounced upon you at this time, you may speak to the Court or have your attorney speak for you. Is there any legal cause?

DEFENDANT PICIRILLO: No legal cause at this time.

DEFENDANT LA BELLO: No legal cause at this time.

MR. SIEGEL: If your Honor please, I know that by now you have a full and complete probation report, and therefore I most respectfully ask your Honor to give these defendants every possible consideration consistent with all of the facts and circumstances of this case, having in mind the several conferences between the Court, the assistant district attorney, and counsel for the defense.

THE COURT: Is there anything you would like to say, Mr. Koota?

MR. KOOTA: Yes, if the Court pleases; customarily, [fol. 3] as your Honor knows, our office takes no position on questions of sentence, that being one which the law delegates exclusively to the discretion of the Court, and it is rare, indeed, that I personally appear on a sentence, even in those instances when the position of our office is made known to the Court. But I regard this case as so important to the administration of justice in Kings County that I ask your Honor's indulgence so that I may personally express our views insofar as the sentence of these defendants is concerned.

I should like to acquaint the Court with some facts which may be within the ken and knowledge of the Court, but I see no harm in their repetition if they are. The original investigation into the circumstances under which Mr. Jack Graham, who was assaulted, came to our office, as I recall, was through the Department of Investigation, to whom Mr. Graham had originally complained. Mr. Graham came to our office and I interviewed him personally. This was some time after March of 1964, and there he told me about the assault that had been committed upon him by these defendants, and I immediately directed that special attention be given to this case.

[fol. 4] Mr. Graham at the same time told us about certain machinations and improper conduct and facts which would tend to indicate that conspiracies were being conducted by groups of painters in connection with the New York City Housing Authority. Mr. Graham's position was that he believed that he was assaulted as a

result of his failure to go along with the clique, or the ring that was working in cahoots, so he said, with certain members of the New York City Housing Authority, and it was obvious to me at this time that the case transcended the ordinary run-of-the-mill, or routine type of assault where robbery may be a motive.

What struck me as peculiar in that assault case was the fact that when Mr. Graham was at this housing project, the name of which escapes me at the moment; it was a housing project in Brooklyn, and he was there to meet one of the representatives of the New York City Housing Authority; I think he was a superintendent of painting at that time; he was told by this individual, whom he was supposed to meet, to park his automobile in a certain part of the parking lot adjacent to the housing development, and where this representative of the Housing Authority would meet him. In other words, [fol. 5] under normal circumstances, if they arranged a meeting at the project, they would meet in the office of the project, but in this instance, the representative of the Housing Authority said, "You take your car and park it in this space, and then come out and I will meet you." It was perfectly obvious to me and to my associates, who were not altogether without experience in the field of criminal practice, that there was something behind this assault that was deeper and required further investigation.

So we moved this assault case for trial, and the defendants pleaded guilty and were sentenced. Before the sentence, we asked the Court—it was Judge Barshay, I recall—to withhold the execution of the sentence to afford these defendants an opportunity to cooperate with me in my office, so that we could find out how high this thing went; who put these men up to committing this assault. That is what we were vitally interested in, aside from the fact that an unprovoked assault had been committed and the perpetrators should be punished. We were interested in a more fundamental problem—who put these men up to this assault and what motive inspired this [fol. 6] assault. But they were intransigent. The sentence was executed, and we then brought them back to

the grand jury and interrogated them in the grand jury, and there they told us a story that comes right out of Grimm's Fairy Tales. They told us they were sitting in the cafetria and some man came over to them and asked them if they wanted to make $50, and they said yes, and he took them in the automobile over to this project, and there he said, "I want you to beat up a certain individual," and this man, an unknown individual, gave them some tire irons with which the assault was committed.

Now, their description of this individual was that he was tall and short, that he was fat and thin, that he had dark hair and light hair. So your Honor can see that these men were just stalling.

Our attention had already come to the subject of the bribe, or attempted bribe that had been committed with reference to Patrolman Sewell, but in order to get at the bottom of this; to get at the higher-ups who were responsible for his assault, I would have gone to the extent of not prosecuting these individuals for the bribery, and give them immunity against that, if they would tell us [fol. 7] who put them up to this, and I would have seen that clemency was exercised, if possible, even in the assault case, because it was more important for the interest of justice that we ascertain the identity of these individuals.

Mr. Graham gave us additional information concerning the so-called conspiracy among certain painting contractors and with some officials in the New York City Housing Authority, which we investigated very carefully. But finding that there was no jurisdiction in the county of Kings, I communicated with Mr. Hogan, the district attorney of New York County; a conference was held at our office, and all the information available to us, including Mr. Graham's statements, were turned over to the New York County district attorney's office, and it is a matter of record that following their investigation, several indictments were procured.

Now, we are confronted again with this question as to whether these men will tell us the identity of the person who put them up to this assault; but there is

even something that is deeper at this moment than the identity of that individual, because we have some evidence that another person in the New York Housing Authority, whom I will not identify at the moment, en- [fol. 8] deavored to get Patrolman Sewell to accept the bribe that had been offered by these defendants and to go along with them in the attempt to kill this assault case, and it is the identity of this other individual and the part that he played in this attempted bribe that we are seeking to ascertain.

What is behind all this? Who in the New York City Housing Authority is afraid of what these defendants are going to tell? Who is sealing the lips of these defendants? They are abiding by the code of the underworld. They won't talk, apparently, under any circumstances.

The sentence was on two weeks ago, as I understand it, and I think Mr. Schmier made our position clear. They had two weeks within which to come to us and tell us who was behind all of this, and they are mute. Their lips have been effectively sealed.

I am going to ask that the Court, in view of all these circumstances, impose the kind of sentence to run in addition to the sentence that has been impose upon them for the assault, which would meet with the interest of justice, and I am sure, your Honor, that no matter what [fol. 9] that sentence is, our investigation will continue until we get to the bottom of this.

THE COURT: Is there anything further that you want to say?

MR. SIEGEL: I don't think so. I think the People have their pound of flesh. They have already sentenced these people, and they are facing another sentence.

THE COURT: Before I pronounce the sentence of this Court, Mr. Siegel, I will afford each one of these defendants an opportunity to say whether they want to make any further disclosures, as to whether anyone else is behind this matter. It is apparent to the district attorney's office that there is someone behind these two defendants. It was not their individual act. I will give them an opportunity in open Court, if they wish, to make any disclosure. If they do, I will go along with

the district attorney. I will hold up the sentence, and if they do wish to cooperate, I might even be inclined to suspend the execution of any sentence, if it is of any value to the district attorney in his effort to track down those who are behind this scheme, this conspiracy to defeat the legitimate ends of the painting trade, or whatever organizations are concerned.

[fol. 10] MR. SIEGEL: They just advised me they have no information.

THE COURT: The sentence of the Court is, as I indicated at the time that I took this plea, when the plea had been heretofore taken and vacated, as I understand it because Mr. Koota was not in accord with the sentence that was going to be pronounced, that would run concurrently with the sentence of assault that was imposed by Mr. Justice Barshay at the time that he had the assault charge, and I indicated to the defendants and also to you, Mr. Siegel, that any sentence that I was going to impose was going to commence after the expiration of the sentence that they are now serving in Sing Sing Prison. Is that so?

MR. SIEGEL: That's right.

THE COURT: The sentence of the Court is that you, Ralph Picirillo, shall be sentenced to Sing Sing Prison for a term of one year and six months to three years, and that that sentence shall not commence until the expiration and the completion of the sentence that you are now serving for the crime of attempted assault in the second degree.

The sentence of the Court as to you, Anthony La [fol. 11] Bello, is that you be committed to Sing Sing Prison for a term of one year and six months to three years, and it is the intention of the Court that that sentence shall not commence to be served until the sentence that you are now serving for the crime of attempted assault in the second degree shall have been completed.

The defendants stand committed.

(Defendants remanded.)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County

HON. GEORGE J. BELDOCK, *Presiding Justice*
HON. SAMUEL RABIN
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER
HON. M. HENRY MARTUSCELLO
Associate Justices

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ANTHONY LA BELLO and RALPH PICCIRILLO, APPELLANT

ORDER ON APPEALS FROM JUDGMENTS OF CONVICTION—June 3, 1968

In the above entitled action, the above named Anthony La Bello and Ralph Piccirillo, defendants in this action, having appealed to this court from two judgment of the Supreme Court, Kings County (each as to a respective one of the defendants) both rendered January 19, 1966; and the said appeals having been submitted by Theodore Rosenberg, Esq., of counsel for appellant LaBello, by Nathan Z. Dershowitz, Esq., of counsel for the appellant Piccirillo and by Stanley M. Meyer, Esq., of counsel for the respondent. and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgments appealed from are hereby affirmed. Beldock, P.J., Rabin, Benjamin and Munder, JJ., concur. Martuscello, J., dissents and votes to reverse the judgments and to dismiss the indictment, with dissenting memorandum as set forth in decision slip dated June 3, 1968.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

IN THE APPELLATE DIVISION OF THE SUPREME COURT SECOND JUDICIAL DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ANTHONY LA BELLO and RALPH PICCIRILLO, APPELLANTS

OPINION—June 3, 1968

Two judgments of the Supreme Court, Kings County (each as to a respective one of the defendants), both rendered January 19, 1966, affirmed. No opinion. Beldock, P. J., Rabin, Benjamin and Munder, JJ., concur; Martuscello, J., dissents and votes to reverse the judgments and to dismiss the indictment, with the following memorandum: Defendants were indicted for the crime of bribery. They pleaded guilty to attempted bribery and were sentenced to a prison term. Prior to the entry of their guilty pleas, they moved for inspection of the Grand Jury minutes and for dismissal of the indictment on the ground that they had been granted immunity from prosecution for the crime charged therein. The court below directed the prosecution to furnish defendants with a copy of the Grand Jury minutes, but denied the motion to dismiss the indictment, ruling that this crime was not covered by the immunity granted them. The appeals from the judgments bring up for review the propriety of the denial of dismissal; and the only question presented thereby is whether defendants were immunized from prosecution on the bribery charge. The material facts underlying this question are as follows: On March 19, 1964, defendants were arrested by Patrolman Sewell for assaulting one Graham with tire irons. These weapons were recovered by Sewell at the time the arrest was made. Defendants allegedly on March 20, 1964 offered to give Sewell $1,000 or $1,500 to get rid of the weapons. Sewell immediately reported this offer to an Assistant District Attorney of Kings County. Defendants, how-

ever, were not arrested in connection with the alleged bribe offer until after they were indicted therefor on July 14, 1965. In the meantime, they were indicted for the assault committed on Graham and on January 11, 1965 were convicted upon their pleas of guilty of attempted assault in the second degree and each was sentenced to a prison term of one year and three months to two years and six months. In March, 1965, a Kings County Grand Jury undertook to conduct an investigation to ascertain whether any criminal conspiracies existed in connection with the assault on Graham. In charge of this investigation was the selfsame prosecutor to whom Officer Sewell had reported the afore-mentioned bribe offer on March 20, 1964. Defendants were recalled from prison and taken before the Grand Jury on March 18, 1965 to testify as witnesses. La Bello, the first called, was sworn and gave as his address Sing Sing Prison. The prosecutor, after informing him of the purpose of the investigation, asked him whether he had been indicted and convicted for the assault committed on Graham. La Bello refused to answer on the ground that he might thereby incriminate himself. The prosecutor thereupon stated to him that he had been convicted and sentenced for the assault and could not again be prosecuted therefor; that the Grand Jury, nevertheless, would vote on whether to grant him immunity; and that if immunity were granted he could not be prosecuted for his answers. Asked if he understood the statement thus made to him, La Bello replied, "Yes. I'd like to see my attorney." The prosecutor then advised him that the Grand Jury would vote on whether to grant him immunity; and that, if it were granted and he refused to answer questions, an application would be made to hold him in contempt. La Bello was excused. The Grand Jury voted to grant La Bello immunity pursuant to section 2447 of the Penal Law. Thereafter, he returned to the Grand Jury room and, after being apprised of the immunity conferred, answered all questions. In the course of his examination he testified, among other things, that he had been convicted of the assault on Graham and sentenced to Sing Sing; that he and Piccirillo had

assaulted Graham tire irons; that a person known to him only as Tony had hired them for $100 to commit the assault and had provided the weapons used; and that, while assaulting Graham, his weapon fell, and he ran away and was caught by a policeman. Defendant Piccirillo was sworn and apprised of the purpose of the investigation. He was also granted immunity and, after being advised of its meaning, stated that he would answer all questions but would like to speak to his attorney. The prosecutor thereupon assured him that he was not a defendant but a witness; that he could not be prosecuted; and that there was no reason to confer with his attorney. Piccirillo thereafter answered all questions, making the same admissions as had been made by La Bello, moreover stating that the tire irons in the possession of the police were the instruments they had used. On March 22, 1965, four days after defendants testified, Officer Sewell was called as a witness before the same Grand Jury. He testified that he had arrested defendants on March 19, 1964 for the assault on Graham that they had told him they were hired to commit the assault; that weapons which he then produced had been recovered from defendants; that, after defendants were arraigned in the Criminal Court in Brooklyn on May 20, 1964, they offered him $1,000 or $1,500 to get rid of the weapons; and that he went directly to the District Attorney's office and reported the bribe offer to the aforementioned prosecutor. Defendants were indicted for bribery on July 14, 1965; and on January 19, 1966 each was sentenced, on his plea of guilty, to a prison term of one year and six months to three years, to commence at the expiration of the sentence which had been imposed upon him for the assault conviction. The immunity granted pursuant to section 2447 of the Penal Law was complete and as broad in its scope and effect as the protection afforded by the constitutional prohibition against self-incrimination (*People* v. *De Feo*, 308 N. Y. 595). After such immunity was granted, defendants were required to testify in the investigation under pain of prosecution for criminal contempt. They, however, were protected from prosecution for any answers proving them

guilty of any crime for which they might be prosecuted, or, falling short of proving such crime in its entirety, would prove some part or feature thereof, when combined with proof of other circumstances which others might supply (*Matter of Doyle*, 257 N. Y. 244; *People ex rel. Coyle v. Truesdell*, 259 App. Div. 282). Defendants' admissions that they committed the assault on Graham with tire irons, though made in response to questions relating to the assault for which they had been convicted, did not diminish the force of the immunity granted them, since the admissions related to facts and circumstances which would require the official conduct they allegedly sought to frustrate, and thus constituted a link in the chain of evidence necessary to prove the crime for which they were indicted (cf. *Malloy v. Hogan*, 378 U. S. 1). Nor was their immunity in any wise undermined by the fact that Officer Sewell's testimony, standing alone, was sufficient to establish that crime (*People v. Bermel*, 71 Misc. 356).

No. 414

Form 6
Remit. # 2808
Ind. # 1053/65
App. # 6677

COURT OF APPEALS

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 24th day of April in the year of our Lord one thousand nine hunderd and sixty-nine, before the Judges of said Court.

WITNESS,

The HON. STANLEY H. FULD,
Chief Judge, *Presiding*.

RAYMOND J. CANNON,
Clerk.

REMITTITUR—April 24, 1969

2. No. 414. 68

THE PEOPLE &C., RESPONDENT

vs.

ANTHONY LABELLO and RALPH PICCIRILLO, APPELLANTS

BE IT REMEMBERED, That on the 9th. day of September in the year of our Lord one thousand nine hundred and sixty-eight, Anthony La Bello and Ralph Piccirillo, the appellants in this cause, came here unto the Court of Appeals, by Theodore Rosenberg and Anthony F. Marra, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Nathan Z. Dershowitz, of counsel for the appellant Piccirillo, submitted by the appellant LaBello, and argued by Mr. Stanley M. Meyer, of counsel for the respondent—, and, after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ Raymond J. Cannon

Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE,)
)
ALBANY, APRIL 24, 1969.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

/s/ Raymond J. Cannon
[SEAL] Clerk

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ANTHONY LA BELLO and RALPH PICCIRILLO, APPELLANTS

OPINION—Decided April 24, 1969.

KEATING, J. Called before a Grand Jury investigating a conspiracy to intimidate witnesses who were to testify at a probe of violations of law involving public contracts, appellants, who had previously been convicted of assaulting one of the witnesses, were granted immunity (former Penal Law, § 2447). They then answered all the questions, admitting that they had been hired to commit the assault, but denying that they knew who their principals were.

Four days after appellants testified, the policeman who had arrested appellants was called before the same Grand Jury. During the course of his testimony he told of appellants' attempt to bribe him not to be a witness against them and "to get rid of the evidence." This offer of a bribe was immediately reported to the District Attorney's office.

Appellants were thereafter indicted for bribery and convicted, on their pleas of guilty, of attempted bribery. Prior to their pleas, however, they moved for inspection of the Grand Jury minutes on the ground that they had been granted immunity from prosecution for the crime with which they were then being charged. Appellants were furnished with the minutes, but their motion to dismiss the indictment was denied. On appeal, the Appellate Division affirmed, one Justice dissenting.

The principal questions are two. The first is whether the immunity encompassed the crime charged in the present indictment. The second is whether appellants were the targets of the investigation and, if the answer is in the affirmative, does this require the dismissal of the indictment? We hold that the immunity only bars

the use of the appellants' testimony or any fruits thereof. Since the police officer's testimony was in no way derived from anything said by appellants to the Grand Jury and itself established a *prima facie* case of bribery, the indictment was, therefore, based on sufficient and untainted evidence. Whatever testimony by appellants might be considered of some relevance to the bribery charge may properly be deemed harmless error (*Chapman* v. *California*, 386 U. S. 18). Likewise, we consider it immaterial whether or not appellants were the "targets" of this investigation.

The problem here arises from the confusion which has until recently existed concerning the scope of the immunity which the Constitution mandates must be given before a witness is required to yield his privilege against self incrimination. The source of the difficulty is an ambiguity in the Supreme Court's opinion in *Counselman* v. *Hitchcock* (142 U. S. 547 (1892)). In *Counselman* the Supreme Court held unconstitutional a Congressional immunity statute which only immunized the use of the actual testimony. The statute did not protect the witness against the "fruits" of his testimony. Therefore, the immunity was not co-extensive with the security which the privilege affords. There was nothing to prevent the Government from using the testimony as a starting point for further investigation through which the discovery of additional incriminatory evidence might be procured. It was the statute's failure to protect the witness against the indirect use of his compelled testimony which made it constitutionally deficient.

The entire weight of the decision was that the Fifth Amendment prohibited the direct or indirect use of the testimony (142 U. S. 547, 564, 585-586). At the close of the opinion, however, there was a dictum to the effect that an immunity statute "must afford absolute immunity against future prosecution for the offense to which the question relates" (142 U. S., at pp. 585-586).

Perhaps responding to this dictum Congress, shortly after the *Counselman* decision, passed, as part of the Interstate Commerce Act, a broadly phrased immunity law which has been interpreted by the Federal courts to

grant what is commonly referred to as a "transaction" immunity. This barred the Government from prosecuting the defendant for any crime mentioned by the witness during the course of his testimony. The constitutionality of the enactment was upheld in *Brown* v. *Walker*, (161 U. S. 591 [1896]).

Time has shown that this "transaction" immunity type of statute was unnecessarily broad, that it gives witnesses an immunity not required by the Constitution and that it has the effect of giving an unnecessary "gratuity" to crime. Where the People have a completely good case against a defendant without his testimony, there is not a single sound policy reason, nor is there a constitutional compulsion, requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts simply because the acts were at some point mentioned to the Grand Jury. (*People* v. *Laino*, 10 N Y 2d 161, 173). If he is protected from the use of his testimony or the fruits thereof, he loses nothing if he is then convicted on independent and untainted evidence.

In our view, the Supreme Court's decision in *Murphy* v. *Waterfront Comm.* (378 U. S. 52) has finally resolved the ambiguity raised in *Counselman* on the necessary scope of an immunity statute. (See, also, *Gardner* v. *Broderick*, 392 U. S. 273.) Following *Malloy* v. *Hogan* (378 U. S. 1), which made the self incrimination privilege applicable to the States, the Supreme Court was immediately confronted with the problem of how to accommodate the possible conflicts among criminal law enforcement agencies arising from our Federal system. The court in *Murphy* held that, as a consequence of its holding in *Malloy*, the Federal authorities would be barred from any prosecutional use of State "compelled testimony and its fruits" where a witness is granted immunity after asserting his privilege (378 U. S., at p. 79). No transaction immunity was granted as the footnote to Justice GOLDBERG'S opinion at this point makes patent: "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the

burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence."

Thus only a restriction on use is required. Of significance here is the constitutional basis of the decision. It does not rest upon the Supreme Court's supervisory power over the administration of justice in the Federal courts. (See concurring opn. of Justice HARLAN [378 U. S., at pp. 80-81].) Justice WHITE'S concurring opinion specifically emphasizes this very point that the Constitution requires only a prohibition from use not an absolute immunity (378 U. S., at pp. 92-93). Subsequent decisions of the court reinforce the conclusion that the essence of a valid immunity statute is that it must preclude the use in any manner of the compelled testimony and that is all. (*Gardner* v. *Broderick*, 392 U. S. 273, 278, *supra*; *Sanitation Men* v. *Sanitation Comr.*, 392 U. S. 280, 284; see *United States* v. *Blue*, 384 U. S. 251, 255; see, also, discussion in *Marchetti* v. *United States*, 390 U. S. 39, 58-60 [HARLAN, J.] and in *Grosso* v. *United States*, 390 U. S. 62, 81-83 [WARREN, Ch. J.]; cf. *Stevens* v. *Marks*, 383 U. S. 234, 244-245 [DOUGLAE, J.], 249 [HARLAN, J.].)

New York's law has had a similar confused history in this area (*People ex rel. Lewisohn* v. *O'Brien*, 176 N. Y. 253; *People ex rel. Lewisohn* v. *Court of General Sessions*, 96 App. Div. 201, affd. 179 N. Y. 594; *Matter of Doyle*, 257 N. Y. 244; see, also, discussion in Law Revision Commission Report (N. Y. Legis. Doc., 1942, No. 65[I], pp. 50-54). These cases are based on the absolute immunity interpretation of the *Counselman* case. As a consequence, section 2447 of the former Penal Law, which became law in 1953, parallels in language the Federal statutes which have been interpreted to grant an absolute immunity. There are dicta in the cases which would indicate that section 2447 of the former Penal Law is to be interpreted in a similar manner (*People* v. *Ianniello*, 21 N Y 2d 418, 424-425; see, also, *People* v. *Laino*, 10 N Y 2d 161, *supra*; *People* v. *De Feo*, 284 App. Div. 622, 627, revd. on other grounds 308 N. Y. 595). Still there is no holding to that effect. Since the

question is still open, we should proceed to examine the issue in light of the recent clarifications of the law as to the required breadth of a valid immunity statute.

In *Heike* v. *United States* (227 U. S. 131) Justice HOLMES, writing for a unanimous court, denied immunity in circumstances where the relationship between the compelled testimony and the later charge was entirely too insubstantial. His opinion also suggests that the broad language of that immunity statute (similar to the one involved here) should be interpreted as a use restriction, not as a "transaction" immunity statute (227 U. S., at p. 142): "Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. * * * But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned."

One thing is certain. The rationale of this opinion rests on the view that the Fifth Amendment only requires an "exchange", not an "immunity bath". (See Comment, 31 Brooklyn L. Rev. 157.)

A review of the history of section 2447 of the former Penal Law indicates that the broad immunity language was not a result of a policy choice, but a view that the Constitution required it. (See 1942 Report of N. Y. Law Rev. Comm., N. Y. Legis. Doc., 1942, No. 65 [I], pp. 50-54, *supra*.) There is no evidence that the Legislature felt a "transaction" immunity was a necessary aid for criminal law enforcement. In effect, a District Attorney has always had the ability to grant an absolute immunity by a decision not to prosecute for any crime where he finds it necessary to obtain the willing cooperation of a witness. But this is a conscious decision made in each instance in light of the particular factual circumstances. The "transaction" immunity, however, permits a witness to obtain by a mistake a complete pardon for all crimes although, as here, there is in the

People's possession sufficient untainted evidence to make a complete case against the witness.

Following Justice HOLMES' approach in the *Heike* case (*supra*), we conclude that the Legislature, in passing section 2447, did not intend it was to be an amnesty statute, but desired to afford witnesses only that immunity demanded by the constitutional privilege. Specifically, section 2447 of the former Penal Law (see, Code Crim. Pro. §§ 619-c, 619-d, 619-e) only bars the use of the witness' testimony and any evidence derived therefrom.

There is no doubt that the police officer's testimony here was based on his personal knowledge as the recipient of the bribe offer and that the Grand Jury's indictment was completely based on that testimony. Nothing appellants said indicated that a bribery attempt had occurred. Whatever evidence might have been revealed by the appellants' testimony was wholly insubstantial. Therefore, even if it be assumed that appellants' testimony was related to the bribery, the indictment was not the product of that testimony. Consequently, appellants' Fifth Amendment rights were in no way violated by this indictment.

One of the appellants, Piccirillo, also argues that he was the "target" of the inquiry here and therefore the indictment must be dismissed, citing *People* v. *Steuding* (6 N Y 2d 214). We do not find it necessary to determine whether appellants were or were not the "targets" of the inquiry, here for, in our view, it is immaterial (*People* v. *Tomasello*, 21 N Y 2d 143).

Section 2447 of the former Penal Law was passed to achieve the sound purpose of preventing "immunity baths" which resulted because witnesses were not required to assert their privilege (Third Report, May 4, 1953 of N. Y. State Crime Comm., N. Y. Legis. Doc., 1953, No. 68; 1943 Report of N. Y. Law Rev. Comm., N. Y. Legis. Doc., 1943, No. 65 [B], pp. 47-49). As Judge BREITEL stated in *People* v. *De Feo* (284 App. Div., *supra*, p. 629): "It is this automatic, and what occasionally might be accidental or misguided conferring of immunity, that the new statute is designed to avoid."

Most witnesses who are subpoenaed before a Grand Jury are informed of or, at least, are aware of their privilege against self incrimination. Most also have had the opportunity to consult with counsel and are more conversant about their legal position than is the "target" of a police investigation who is picked up on the street, taken to the police station, given a perhaps perfunctory recitation of his *Miranda* rights and yet is bound by his incriminatory admissions if he then chooses to speak. There is no reason why a witness, even if he is a "target", once informed of his rights, and given an opportunity to consult counsel (*People* v. *Ianniello*, 21 N Y 2d 418, *supra*), should not be required to assert his privilege if he wishes to obtain an immunity. If he does not, his testimony should be usable against him.

Here, however, although Piccirillo did not assert his privilege, he was granted immunity before he could. The precipitous action of the Grand Jury could not operate to deny Piccirillo complete protection from any use of his testimony against him. His testimony could not furnish the basis for a finding of an indictment, and the record demonstrates that it did not.* Nevertheless, we see no justification for going any further and require the dismissal of the indictment simply because Piccirillo may be deemed to have been a target. We, therefore, hold that *People* v. *Steuding* (*supra*) should not be interpreted to require a dismissal of the indictment here.

Accordingly, the judgments of conviction should be affirmed.

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*Since Piccirillo's answers did not form the basis of the present indictment, his claim that his constitutional right to counsel was violated because he was not permitted to confer with his attorney is without merit. No prejudice did or could result for the attorney could have done nothing more for Piccirillo than to assure that he was given the immunity which in fact he did receive. Piccirillo's situation is to be distinguished from that of a witness who, denied permission to confer with his counsel, refuses to answer and is held in contempt. Such a witness might properly claim that, had he been given an opportunity to obtain advice from his lawyer, he would undoubtedly have testified, and thereby been spared a prosecution on a contempt charge.

BERGAN, J. (dissenting). It is settled constitutional law that if a man is called before a Grand Jury and questioned about material facts of a crime and gives answers on those facts, he may not thereafter be indicted by the Grand Jury on such testimony. This principle is based on a policy of protection from self incrimination (*People v. Steuding*, 6 N Y 2d 214).

The New York statute granting immunity (Code Crim. Pro., § 619-c) implements this principle by providing that when a witness refuses to answer on the ground of self incrimination the Grand Jury or other appropriate authority may confer immunity and require the answer be given. The immunity conferred is against a prosecution "on account of any transaction, matter or thing concerning which" he gave answer (subd. 2).

In the present case the statute was not literally followed in one of the cases because one defendant (Piccirillo) had not preliminarily refused to testify on the ground of self incrimination; but the Grand Jury cut short the process by granting immunity when the defendant was called as a witness. The other defendant (La Bello) refused to testify and then was granted immunity. The basic problem, however, is the same in each case.

Whether the immunity resulted as an exercise of statutory power of the Grand Jury or not, it occurred, nevertheless, as a result of the general protection against self incrimination and hence defendants should not have been prosecuted on a crime concerning some essential part of which they testified before the Grand Jury.

The only remaining points are whether the testimony they gave was material to the crime for which they were indicted and whether they were then (when called before the Grand Jury) reasonably to be regarded as targets of the prosecution, as the indictment itself shows they indubitably became, when, a short time after, they were indicted.

Long before the time they were called before the Grand Jury, and contemporaneously with the attempted bribery, a report of that crime had been made to the District Attorney by the police and it was the District Attorney's

duty to prosecute for that crime. Thus, when defendants were called before the Grand Jury they were cast in the dual role of witnesses and probable defendants.

But they were also asked material questions having relevancy to the attempt to bribe the policeman to get rid of one of the weapons which was material evidence in the other criminal charge. On this charge, reported by the police a year earlier, they were indicted by the Grand Jury which heard them as witnesses.

Each defendant testified to the description of the tire irons which had been used in the assault. The police witness then brought the tire irons physically before the Grand Jury and testified that defendants had offered a bribe to him if he would, as he said, "get rid of one of the weapons * * * get rid of the evidence".

The relevancy of their testimony to the charge on which they were indicted is manifest. That they had committed the crime concerning which they sought to bribe the policeman not to testify was a basic premise of the bribery. The weapons they told the Grand Jury they had used were vital to the policeman's testimony that they had attempted to bribe him "to get rid of the evidence".

The use of their testimony could not have been inadvertent. Almost immediately after defendants' testimony the Grand Jury heard proof of a bribe in relation to the very things defendants were questioned about. The indictment for bribery followed this testimony. It is clear when they were called the People intended to seek to indict them. They were asked to testify to facts which were essential and relevant elements in the crime for which they were indicted.

The majority opinion concedes under the circumstances in this case the testimony of defendants as a matter of law "could not furnish the basis for a finding of an indictment" but adds that the record "demonstrates that it did not".

The record is not to be read this way. The attempted bribe of the policeman related to a crime for which he had arrested defendants. They testified about that crime. The bribe related to an exhibit or exhibits with which

the crime was committed. Defendants testified about them.

It is not possible on this record, then, to insulate this testimony from the resulting indictment. It has long been the settled law of New York that a prospective defendant obtained complete immunity if his testimony was material to the prosecution and was compelled (*People v. De Feo*, 308 N. Y. 595, 602-603; *Matter of Doyle*, 257 N. Y. 244; *People ex rel. Lewisohn v. O'Brien*, 176 N. Y. 253; *People v. Sharp*, 107 N. Y. 427).

The majority opinion stresses the ambiguity in construing immunity statutes and suggests that to construe them too inclusively is to give an unnecessary "gratuity" to crime. That is not the question in this present case.

The question is whether, having been asked about facts relevant to a crime in which they were probable defendants, they could thereafter be indicted by any Grand Jury for that crime.

The cited decisions of the Supreme Court in *Malloy v. Hogan* (378 U. S. 1), which equated the protection against State infringement of the privilege to a Federal infringement of it; in *Murphy v. Waterfront Comm.* (378 U. S. 52), which extended, to protect against subsequent Federal utilization, protection obtained under a State immunity law; and in *Gardner v. Broderick* (392 U. S. 273), which reversed a decision of this court (20 N Y 2d 227) upholding the discharge of a policeman for refusing to waive immunity, have little relevancy to the problem now before the court.

This present case does not involve the problem of "leads" to evidence, or the sufficiency of evidence other than that adduced from defendants. Possibly the People had enough other evidence to obtain an indictment. But, for some reason not made clear—either strategy or perfection—they adduced from the defendants themselves material evidence considered in indicting them.

The judgments should be reversed.

Judges BURKE, SCILEPPI and JASEN concur with Judge KEATING; Judge BERGAN dissents and votes to reverse in a separate opinion in which Chief Judge FULD and Judge BREITEL concur.

Judgments affirmed.

SUPREME COURT OF THE UNITED STATES

No. 630 Misc., October Term, 1969

RALPH PICCIRILLO, PETITIONER

v.

NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1249 and placed on the summary calendar.

February 27, 1970

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Supreme Court of the United States

OCTOBER TERM 1980

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No. [redacted]

RALPH PICCIRILLO,

Petitioner,

—against—

NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term 1969

No. 630 Misc.

RALPH PICCIRILLO,

Petitioner,

—against—

NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner seeks a Writ of Certiorari in order to review an order of the Court of Appeals of the State of New York, dated April 24, 1969, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated June 3, 1968 which in turn affirmed a judgment of the Supreme Court of the State of New York, Kings County, rendered on January 19, 1966, convicting petitioner of the crime of Attempted Bribery as a Felony.

Previous Proceedings

Petitioner was convicted by judgment of the Supreme Court of the State of New York, rendered January 19, 1966, upon a plea of guilty during trial, of the crime of Attempted

Bribery as a Felony, which sentenced him to 1½ to 3 years in prison.

The Appellate Division of the Supreme Court of the State of New York, affirmed without opinion on June 3, 1968, with one Justice dissenting in an opinion reported at 30 A.D. 2d 664. The Court of Appeals of the State of New York, by four to three decision affirmed with majority and dissenting opinions on April 24, 1959. (24 N.Y. 2d 598)

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner contends he was denied his rights under the Fifth and Fourteenth Amendments to the United States Constitution because he was indicted for a crime concerning which he claims he was granted immunity. He also claims that his right to counsel was violated under the Sixth and Fourteenth Amendments because he was not allowed to consult with his attorney when he was in the Grand Jury. Respondent takes the position that no substanted federal question exists.

Facts

On March 19, 1964, petitioner and a co-defendant, Anthony Labello, were arrested for assaulting one Jack Graham at a housing project in Brooklyn; apparently with tire irons. The beating was believed to be at the direction of others, who paid Labello and Piccirillo, and the investigation which later ensued resulted in various indictments secured by the New York County District Attorney involving a "painting scandal" in connection

with property maintained by the New York Housing Authority (Minutes of Sentence 1/19/66 3-8).

On March 20, 1964, petitioner attempted to bribe Patrolman William A. Sewell, the Housing Authority Officer, the day after he arrested the two men for the assault. He recovered the fire irons and the next day, in Criminal Court, was offered money to change his testimony and get rid of the weapons. A meeting was set up for that evening and the officer met with the men, with minifon equipment on him and the offer was made again (Grand Jury Minutes, 3/22/65 6-13). The defendants were not arrested until after indictment which was handed down on July 14, 1965.

On January 11, 1965, Piccirillo and Labello were sentenced for the Attempted Assault charges after having pleaded guilty. They, thereafter, on March 18, 1965, were both called into the Grand Jury, were given immunity and were interrogated about the circumstances of the assault in an obvious attempt to learn who was behind the whole scheme, an attempt which proved fruitless. On March 22, 1965, Officer Sewell testified and on July 14, 1965, the Attempted Bribery Indictment was handed down.

On August 9, 1965, both men pleaded guilty but the pleas were later withdrawn on November 10, 1965.

A motion was made by both men for an inspection of the Grand Jury minutes and for the dismissal of the indictment on the ground that the immunity afforded them also extended to the Bribery charge, but their application was denied on December 13, 1965, by Hon. David L. Malbin, who also wrote an opinion. The Court held that the testimony given by defendants "could not be construed in

the slightest degree that it offered a lead or suspicion" to the Bribery charge. That issue, and the scope of the immunity given was the issue on appeal.

After their applications were denied, the defendants pleaded guilty on December 17, 1965, during trial, and were sentenced as aforesaid on January 19, 1966.

POINT I

The scope of the immunity after petitioner, as construed by the Court of Appeals of the State of New York, is co-extensive with his constitution privilege against self-incrimination although it affords protection which is only testimonial and not transactional in nature.

The Court of Appeals held in this case, 24 N.Y. 2d 598 (1969) that the New York immunity statute (now C.C.P. 619 c and d) "only bars the use of the witness' testimony and any evidence derived therefrom" (p. 604). The Court treated the question of whether such immunity was sufficient under the Constitution as follows (p. 602):

> "Time has shown that this 'transaction' immunity type of statute was unnecessarily broad, that it gives witnesses an immunity not required by the Constitution and that it has the effect of giving an unnecessary 'gratuity' to crime. Where the People have a completely good case against a defendant without his testimony, there is not a single, sound policy reason, nor is there a constitutional compulsion, requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts simply because the acts were at some point mentioned to the Grand Jury (*People* v. *Laino*,

10 N Y 2d 161, 173). If he is protected from the use of his testimony or the fruits thereof, he loses nothing if he is then convicted on independent and untainted evidence."

A reading of *Murphy* v. *Waterfront Comm.*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed 2d 678 (1964) and *Malloy* v. *Hogan*, 378 U.S. 1, 12 L. Ed 653, dispels all uncertainty as to the constitutionality of C.C.P. 619 c and d as construed in *La Bello*. The Murphy case holds "the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him." (84 S. Ct. at 1609).

Read together with the holding in *Malloy* v. *Hogan, supra*, "that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states" (84 S. Ct. 1492), the conclusion is inescapable. The standard enunciated in Murphy as applicable between State-Federal investigations and prosecutions must equally apply to interstate and intrastate criminal proceedings. The Supreme Court in Malloy continued p. 11:

"It would be incongrous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."

The *Murphy Case, supra* in overruling *Feldman* v. *United States* (322 U.S. 487) and other similar cases prescribed the

one applicable standard governing prosecutions subsequent to a grant of immunity—that the testimony elicited from a witness under a grant of immunity cannot be used against the witness in any criminal proceeding. As was stated by Mr. Justice White (with Mr. Justice Stewart, concurring) p. 106:

> "The Constitution does not require that immunity go so far as to protect against all prosecutions to which the testimony relates, including prosecutions of another government, whether or not there is any casual connection between the disclosure and the prosecution or evidence offered at trial. In my view it is possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity."

The New York immunity statute as construed in this case, affording as it does a bar to the use of any evidence directly or indirectly derived from compelled testimony against the person compelled to testify, is protection co-extensive with the privilege against self-incrimination. That the statute need go no further may be confirmed by a reading of the constitutional provision itself, that no person "shall be compelled in any criminal case to be a witness against himself" U.S. Const. Amend. V. If evidence is derived totally independent of the testimony, the witness cannot be deemed to be "a witness against himself" under any conceivable construction one may place upon that language.

POINT II

The immunity afforded petitioner did not extend to the crime of attempted bribery.

The facts in this proceeding are virtually undisputed and only one major issue is presented. After petitioner pleaded guilty to the Attempted Assault and was later, after a grant of immunity, required to give testimony in the Grand Jury, he was subsequently indicted for Attempted Bribery. Prior to finally accepting a plea, a motion to dismiss the indictment was made based on the theory that the immunity afforded extended also to the Attempted Bribery charge. Mr. Justice Malbin, in an opinion dated December 13, 1965, denied the motion and took the position which respondent takes now and submits is a correct analysis of the existing law regarding this situation. The Court said:

> "Among the contentions raised by the defense, that the defendants when they appeared as witnesses before the Grand Jury received full and extensive immunity that encompassed the present indictment, is without merit. The testimony furnished by them could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in this indictment."

Immunity is governed by Section 2447 of the Penal Law, which is now found in Section 619 of the Code of Criminal Procedure, and to supplant the constitutional privileges of a witness he must be afforded testimonial protection. It must be co-existent with the protection provided by the Constitution (*Counselman* v. *Hitchcock,* 142 U.S. 547; *Brown* v. *Walker,* 161 U.S. 591; *Hale* v. *Henkel,* 201 U.S. 43. But even if the immunity provided must also be transactional in nature,

petitioner would not be protected from a Bribery charge in this case. Courts which have interpreted the meaning of transactional immunity have held that any testimony that the witness gives in response to relevant questions which indicates he may have committed another crime, although not connected with crimes then under investigation, cannot be used against him directly, or as a link in the chain of evidence and he cannot be prosecuted for such crimes even with the use of other evidence (*Matter of Cioffi*, 8 N.Y. 2d 220; *People* v. *Breslin*, 306 N.Y. 294, cert. den. 347 U.S. 1014; *People* v. *Brayer*, 6 A.D. 2d 437. The other crimes must be crimes which his testimony revealed or which grew out of his testimony. Thus, Courts have also spoken of the necessity that the testimony be revealing or self incriminating (*People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539; *United States* v. *Niarchos*, 125 F. Supp. 214; *United States* v. *Onassis*, 125 F. Supp. 190; *Himmelfarb* v. *United States*, 175 F. 2d 924, cert. den. 338 U.S. 860; *Kvonck* v. *Cooney*, 244 Iowa 153; *Halpin* v. *Scott*; 415 Ill., 104; *People* v. *Norwood*, 312 Mich. 266; *People* v. *Breslin*, *supra*; *People* v. *Brayer*, *supra*; *Matter of Cioffi*, *supra*; *Matter of Second Additional Grand Jury*, 10 A.D. 2d 425.

This is in keeping with the obvious purpose of immunity statutes to secure evidence which is self-incriminating and otherwise unavailable without the protection given by a grant of immunity (*United States* v. *Niarchos*, *supra*; *United States* v. *Onassis*, *supra*). To hold otherwise would be to strain the interpretation to be placed on Section 2447 and turn it into a "shield for the guilty") *People* v. *Rine*, 173 Misc. 1010, 1015). It can be stated generally that the protection from prosecution for other crimes only extends to crimes regarding which a witness directly testifies or gives evidence concerning which are revealed by his testimony and which are substantially

connected with the evidence given (*Heike* v. *United States*, 227 U.S. 131).

Even in *People ex rel Coyle* v. *Truesdell*, 259 App. Div. 282, relied on below heavily by petitioner, in determining whether the witness was immune from the subsequent prosecution an inquiry was made as to whether his answers were actually incriminating or could be used to establish facts against him.

In the instant proceeding, the answers given by petitioner revealed nothing, were not incriminating and did not remotely relate to the subject of the second prosecution. The bribery prosecution was not related to the subject then being investigated by the Grand Jury, whether others instigated the assault and whether improprieties existed regarding painting contracts with the New York Housing Authority. By the terms of the explanation of the immunity given by the prosecutor in the Grand Jury, petitioner could not reasonably have considered the immunity to be as broad as he now urges it is.

The Court below examined the minutes of the Grand Jury and saw that the Assistant District Attorney told the petitioner that the Grand Jury was investigating the assault committed on Jack Graham and all conspiracies connected with the assault (Grand Jury Minutes 3/18/65 5, 63). Petitioner was also told that he could not be prosecuted on account of any answers they might give (Grand Jury Minutes 3/18/65 6, 7, 63, 64). Extensive interrogation was had and the petitioner gave answers, although apparently not satisfactory, concerning the circumstances of the assault and the events leading up to it (Grand Jury Minutes 3/18/65, 5-62, 63-100). No mention of the attempted bribe was made and the weapons were discussed only insofar as the witness was

asked to describe the assault itself, where the weapons were obtained and questions were asked of a similar nature. No mention of the name of Patrolman Sewell, the officer whom the petitioner offered the bribe to was made and the circumstances of the arrest or the arraignment the next day, when the bribe was offered, were not gone into in the slightest. Petitioner's contention is that because one of the things he offered Sewell money for was to lose the weapon and since the weapon was mentioned during the bribe offer, although in a totally different context, the mere fact that the weapons were mentioned or described makes the subsequent indictment invalid because the weapon was a "thing" testified to in the Grand Jury.

Such an argument stretches logic to the breaking point. The Attempted Bribery indictment was not based on the weapon and its essential elements did not depend in the slightest upon any evidence given by either defendant. Had petitioner admitted ownership of the weapons and then been prosecuted on a weapons charge or for an illegal possession violation, then truly he would have been subjected to prosecution because of things revealed in his testimony. Here, all the essential elements of the crime were included in the testimony of the officer upon whose evidence the indictment was based. The fact that petitioner possessed weapons with which he assaulted Jack Graham was nothing new but merely cumulative. This was already known, the petitioner had been indicted and had already pleaded guilty. No mention of the weapon would have to be made to sustain a bribery prosecution. Nothing was disclosed and it is the disclosure of facts not otherwise known or available which is the entire purpose behind calling witnesses to a Grand Jury and giving them immunity (*People ex rel. Hunt* v.

Lane, 132 App. Div. 406, affd. 196 N. Y. 520; *People* v. *Cahill*, 126 App. Div. 391 affd. 193 N.Y. 232; *United States* v. *Onassis*, *supra*). The witness only gets immunity regarding those matters actually testified to and not all things to which strained logic may lead (*People* v. *Fine*, *supra*). Broader interpretations than necessary to effectuate the purposes of immunity statutes should not be indulged in (*United States* v. *Niarchos*, *supra*).

The procedure followed by respondent and the Grand Jury in this case is not unusual in a proper case:

> "The condemnation that has been asserted against the practice of calling the accused as a witness in the very proceeding in which the charge against him is being investigated (*People* v. *Ferola*, 215 N.Y. 285), if it has any relation to cases where immunity is intended to be and is granted, would not seem to be applicable to an inquiry directed in good faith towards establishing the commission of crimes by others." (*People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539.)

The testimony of petitioner was not incriminatory nor did it reveal anything not previously known. The questions asked and the responses made were not reasonably connected with nor did they refer to the Attempted Bribery charge. The rationale of Mr. Justice Malbin's decision denying the motion below was a correct appreciation of the applicable law that under the facts of this case petitioner was not immune from the Attempted Bribery prosecution.

POINT III

The petitioner's right to counsel was not diluted. Even if technical interference existed it has no application to this case.

When Mr. Piccirillo appeared before the Grand Jury of Kings County he was told that the Grand Jury was investigating the assault on Jack Graham and any conspiracies in connection therewith. (G.J. min. 63). The meaning of statutory immunity was explained and the prosecutor said he would ask the Grand Jury to vote him immunity. He also said that after it was granted the witness could not be prosecuted in any crimes that his answers connected him with (G.J. 63-65).

The petitioner left the room and upon his return was informed by the foreman and prosecutor that he had been granted immunity (G.J. 64). Then after saying that he would answer the question he said "I'd just like to speak to my lawyer." The prosecutor replied:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?"

Petitioner replied: "yes" (G.J. 65) and thereafter he was questioned at length (G.J. 65-100). No mention of the attempted bribe was made except that the fire iron was mentioned in that it was the weapon he was paid to use on the victim of the assault.

Respondent will be the first one to agree with petitioner that the right to counsel is extremely important and, de-

pending upon the circumstances, a witness in a grand jury should generally be permitted to consult with counsel who is presumably in the hallway unless it will unduly disrupt the proceedings.

Respondent submits however, that this principle does not apply to the case at bar. If the witness is ultimately prosecuted for perjury or contempt it could be argued that had he been allowed to consult counsel he could have been advised that a proposed answer or course of action might be perjurious or contemptuous. It could then be said that counsel could have played a significant role and that the witness' desire to consult could be for other purposes than to seek aid in how to answer the question in an improper manner.

Where, as here, however, the prosecution is for a substantive crime not then under investigation and not fairly connected with the testimony, the violation of the right to counsel, if any, is irrelevant. It could make no difference since petitioner could not have asked his lawyer about things which were apart from the proceedings at that time.

In addition, the record shows that the request was not regarded as important by petitioner himself and the entire pattern of questions and answers shows that no real assistance was necessary or could have been given. When the only aid sought would or could have been in the answering of difficult or embarassing questions the denial of the request should not be considered to be a denial of constitutional rights. *People* v. *Ianiello*, 21 N.Y. 2d 418, 426.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
November 25, 1969

Respectfully submitted

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IN THE

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OCTOBER TERM, 1970

No. 97

RALPH PICCIRILLO,

Petitioner

v.

NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 97

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

OPINION BELOW

The majority and dissenting opinions of the New York Court of Appeals are reported at 24 N.Y.2d 598, 301 N.Y.S.2d 544, and appear in the printed appendix at pages 113-123. The majority and dissenting opinions of the Appellate Division of the Supreme Court, Second Judicial Department are reported at 30 A.D.2d 664, 291 N.Y.S.2d 881, and appear in the printed appendix at pages 107-112. The opinion of the Supreme Court, Kings County, is not officially reported and appears in the printed appendix at pages 65-66.

JURISDICTION

The judgment of the New York Court of Appeals was entered April 24, 1969 (R. 111).[1] Petition for writ of certiorari was filed July 19, 1969 and certiorari was granted February 27, 1970. The jurisdiction of the Court is invoked pursuant to Title 28 of the United States Code, Section 1257(3).

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V

* * *

UNITED STATES CONSTITUTION

Amendment VI

* * *

UNITED STATES CONSTITUTION

Amendment XIV, Section 1

* * *

NEW YORK PENAL LAW OF 1909

Section 2447[2]

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority

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[1] References "R" are to the separate appendix filed pursuant to Rule 36.

[2] This section is applicable to offenses committed before September 1, 1967.

that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order; and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

NEW YORK CODE OF CRIMINAL PROCEDURE

Section 619-c[3]

1. In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or

[3]This section is applicable to offenses committed after September 1, 1967.

the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

QUESTIONS PRESENTED

1. Whether petitioner's indictment by the same grand jury before which he was compelled to testify was in violation of his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments.

2. Whether the indictment of petitioner for a crime to which his compelled testimony was directly related violated his privilege against self-incrimination as guaranteed by the Fifth and Fourteenth Amendments.

3. Whether the denial of petitioner's request to consult with counsel in connection with his testimony before the grand jury deprived him of his right to counsel under the Sixth and Fourteenth Amendments.

STATEMENT

On March 19, 1964, petitioner and Anthony LaBello were arrested by Patrolman William A. Sewell for assaulting Jack Graham, a housing contractor, with tire irons (R. 34, 35, 55). The tire irons were recovered from the possession of petitioner and LaBello at the time of the arrest (R. 55),

The next day, after their arraignment in Criminal Court, petitioner allegedly offered Sewell $1500 to change his testimony, get rid of one of the weapons and supply the names of possible witnesses (R. 55-56). Sewell agreed to meet petitioner and LaBello that night at a restaurant (R. 56).

Sewell reported the incident immediately to his commanding officer and to Assistant District Attorney Panzarella (R. 56). He was furnished a miniphone tape and proceeded to meet with petitioner and LaBello that evening when the bribe offer was repeated (R. 58). He reported the occurrence to the District Attorney's office and to a detective in the Criminal Investigation Bureau and returned the miniphone tape to the District Attorney (R. 59).

Petitioner and LaBello were subsequently indicted for assault in the second degree and on September 9, 1964, entered pleas of guilty to attempted assault in the second degree. On January 11, 1965, they were sentenced to one year, three months to two years, six months imprisonment. In March, 1965, a grand jury was empanelled to investigate "the assault on Jack Graham and conspiracies arising therefrom." Petitioner, who was serving his sentence on the assault conviction, was called to testify on March 18, 1965. Assistant District Attorney Panzarella conducted the inquiry. Prior to any questioning, the following occurred (R. 32-34):

> Ralph Piccirillo, residing at Sing Sing Prison, was duly sworn as a witness and testified as follows:
>
> BY MR. PANZARELLA:
>
> Q. Mr. Piccirillo, this grand jury is investigating the assault on Jack Graham and any conspiracies in connection therewith. You have been called as a witness before this grand jury, you were sworn, which means that under the law you cannot be prosecuted for whatever testimony you give in answer to any questions put to you. You have already been convicted by your own plea of guilty in the crime of assault on Jack Graham and you

cannot be prosecuted anymore for that. I am going to do one thing. I am going to ask this grand jury to vote on the question of giving you immunity and under Penal Law Section 2447 for the testimony that you will give in this grand jury and that means anything that I ask you and any answers that you give in answer to my questions if it connects you with the crime you cannot be prosecuted for it. That's immunity, do you understand that?

A. Yes.

Q. Now, if you would step out of the room, the grand jury will vote on the question of whether to give you immunity or not.

(Whereupon the witness, Ralph Piccirillo, Mr. Panzarella, and the stenographer left the room.)

(Whereupon the witness, Ralph Piccirillo, resumed the stand and testified as follows:)

Mr. Panzarella: Mr. Foreman, has the grand jury, taken a vote on the granting of immunity to this witness?

The Foreman: We have.

Mr. Panzarella: What was your vote?

The Foreman: We have voted to grant this man immunity.

BY MR. PANZARELLA:

Q. Now Mr. Piccirillo, you heard the foreman of the grand jury?

A. Yes.

Q. You heard that the grand jury has voted to grant you immunity under the law of Section 2447 and again I repeat that means that any testimony you give here if it connects you with the crime you cannot be prosecuted for it?

A. Yes.

Q. Now, you said you wanted to make a statement, make your statement.

A. I just want you to know I'll answer the questions. I'd just like to speak to my lawyer.

Q. Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?

A. Yes.

Q. Now, I'll put the questions to you.

Petitioner admitted he had been convicted of assaulting Jack Graham and he admitted his guilt of the crime (R. 34-35). When asked why he had committed the crime, he testified that he and LaBello had met a man named "Tony" in a diner who had offered him money to commit the assault (R. 35, 38). Petitioner described the weapons he had been given to commit the assault as tire irons, and specified that he had used the larger tire iron while his co-defendant had used the smaller one (R. 40, 43).

In answer to further questioning, petitioner testified that "Tony" had driven him and LaBello to the scene of the assault—a housing project in Brooklyn—in a black, four-door Ford (R. 41, 42). Graham arrived in a car, parked it and got out, and petitioner then walked over and hit him (R. 42). He admitted he had been caught by a policeman while running from the scene (R. 35).

Petitioner further testified that after his arrest he had been at liberty on bail pending his conviction (R. 44-45).

Four days later, on Monday, March 22, 1965, Patrolman Sewell was called to testify before the same grand jury. Again Mr. Panzarella was in charge of the inquiry. Patrolman Sewell testified that on March 19, 1964, after a chase, he had arrested petitioner and LaBello (R. 55). They had admitted being hired to commit the assault and he had seized from them tire irons which he displayed to the grand jury (R. 55). The larger weapon was in petitioner's possession, the smaller in LaBello's (R. 55).

Sewell further testified that when petitioner and LaBello were released on bail at their arraignment the next day, petitioner offered him a bribe to change his testimony, to get rid of one of the weapons, and to supply the names of possible witnesses (R. 56).

They arranged a meeting for that night at a restaurant (R. 56). Sewell immediately reported the offer to his superior and to Assistant District Attorney Panzarella, and he was equipped with a miniphone and advised to attend the meeting (R. 56-57).

At the restaurant, petitioner admitted using the larger weapon and LaBello admitted using the smaller one (R. 58). Petitioner told him they had met someone at a diner who had offered them money to attack Graham (R. 58). Petitioner then described to Sewell how Graham was pointed out to him in the parking lot and how he assaulted him when he left his car (R. 58). This conversation was reported to the District Attorney's office and the miniphone was returned (R. 59).

On July 14, 1965, petitioner and LaBello were indicted by the same grand jury for the bribery of Patrolman Sewell (R. 61). They moved to dismiss the indictment on the grounds that it was based on illegal evidence and was obtained in violation of their privilege against self-incrimination and the immunity which they had been granted (R. 62-64). The motion was denied by Judge Malbin because "[t]he testimony furnished by them could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in the indictment" (R. 65-66).

Petitioner and LaBello proceeded to trial before Judge Malbin on December 16, 1965. Following the selection of the jury, the prosecutor outlined the case he intended to prove, which included the defendants' apprehension by Sewell at the housing project for the assault with weapons on Jack Graham (R. 69). Patrolman Sewell then testified, *inter alia*, that he had arrested petitioner and LaBello as

they were running from the housing project and that he had recovered a tire iron and a lug wrench (R. 73-74).

On December 17, 1965, before defense counsel had finished cross-examining Patrolman Sewell, both defendants offered to plead guilty to attempted bribery to cover the indictment and any other matters pending and known to the District Attorney (R. 92-93). The assistant district attorney agreed and the plea was accepted (R. 93).

When petitioner and LaBello were arraigned for sentencing, on January 19, 1966, Hon. Aaron E. Koota, then District Attorney of Kings County, appeared in person for the People (R. 100). Mr. Koota advised the court that he was interested in the assault on Jack Graham because of its relationship to improper conduct by officials of the New York City Housing Authority (R. 101-102). He stated that the sentencing of petitioner and his co-defendant on the assault charge had been deferred in hopes that they would cooperate with the District Attorney's office, but they were "intransigent" so the sentence was executed (R. 102). The two were then interrogated before the grand jury, but told an unsatisfactory story, and so the bribery charge, of which the District Attorney already had knowledge, was prosecuted, although he would have granted immunity in the bribery case and have arranged clemency in the assault case if petitioner and LaBello had told who had hired them (R. 103). When the defendants had appeared for sentencing two weeks earlier they had been given a chance to talk, but they did not (R. 104). Mr. Koota therefore requested that the sentence on the bribery charge run consecutively to the sentence on the assault charge (R. 104).[4] Although the defendants stated, through counsel, that they had no information, the court sentenced petitioner to one year, six months to three years to run consecutively to the sentence imposed on the assault charge (R. 105).

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[4]The defendants had pleaded guilty to attempted bribery on an earlier occasion, but the plea was vacated because Mr. Koota was not satisfied with the sentence that was going to be imposed (R. 105).

On June 3, 1968, the Appellate Division, Second Judicial Department, affirmed petitioner's conviction without opinion (R. 106). Mr. Justice Martuscello dissented on the ground that the admissions before the Grand Jury "related to facts and circumstances which would require the official conduct they allegedly sought to frustrate, and thus constituted a link in the chain of evidence necessary to prove the crime for which they were indicted" (R. 108). Justice Martuscello concluded that the bribery charge was covered by the immunity which had been granted (R. 109-110).

On April 24, 1969, the Court of Appeals affirmed the Appellate Division order (R. 111-112) in an opinion by Judge Keating (R. 113-119), which held that the New York immunity statute and the federal constitution required that a witness compelled to testify before a grand jury be protected only from the use of his testimony or its fruits, and that the indictment in this case was based on Patrolman Sewell's testimony untainted by petitioner's testimony (R. 113-114). Judge Bergan dissented in an opinion joined by Chief Judge Fuld and Judge Breitel (R. 120-123). The dissenters felt that petitioner's testimony was material and relevant to the bribery charge and that therefore under settled Law of New York they had obtained complete immunity (R. 121-122).

The majority further ruled that petitioner's claim that he had been deprived of his right to counsel was without merit, since petitioner's answers did not form the basis of the indictment and a lawyer could do nothing more than ensure that petitioner would obtain the immunity which he did in fact receive (R. 119).

In a later decision, *Matter of Gold v. Menna*, 25 N.Y.2d 475, 307 N.Y.S.2d 13 (1969), the Court of Appeals ruled that New York's immunity statute did in fact confer "transactional immunity." However, the Court of Appeals stated that petitioner's conviction was proper since "[he] gave no testimony which related or pertained to the offense for which [he was] prosecuted and of which [he was] con-

victed." 25 N.Y.2d at 481, n. 1, 307 N.Y.S.2d at 38, n. 1. The decision of the Court of Appeals in the *Menna* case is set forth as Appendix A.

SUMMARY OF ARGUMENT

The Fifth and Fourteenth Amendments prohibit the use of a witness' compelled testimony in aid of a criminal prosecution against him. This protection extends to the use of such testimony by a grand jury as the basis of an indictment against a witness summoned before it. Petitioner was compelled to admit to committing an assault upon Jack Graham during a grand jury investigation of this assault and conspiracies arising in connection with it. Four days later the police officer was called before the grand jury to testify to a bribe offer made by petitioner to induce the officer to conceal the assault. Petitioner was then indicted by the same grand jury. Petitioner's testimony supplied the underlying motive for the bribery and corroborated many of the details of the officer's testimony. The grand jury also had an opportunity to observe petitioner's demeanor and assess his character. Under these circumstances, the majority below erred in concluding that the indictment was not the product of petitioner's testimony and therefore did not violate his privilege against self-incrimination.

Petitioner's constitutional privilege against self-incrimination was further violated by his indictment and conviction for a crime arising out of a transaction to which his compelled testimony related. Ever since the Court's decision in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), a witness has been entitled to immunity from prosecution for any transaction to which his compelled testimony relates. Only by thus removing any aspect of criminality from the compelled testimony can the immunity grant be coextensive with the constitutional privilege. The transactional immunity rule has been generally adhered to among the states and reaffirmed on several occasions by this Court. The wisdom of the rule is best evidenced by the district attorney's abuse

of power in this case prosecuting petitioner for bribery in retribution for his inability to provide desired information during the course of his testimony compelled by the prosecutor's promise of "immunity".

Recognizing that its conclusion that petitioner was not entitled to transactional immunity as a matter of law was error, the majority below subsequently held that his compelled testimony as to the assault on Jack Graham did not materially relate to the bribery charge. This, too, was error. The subject matter of the bribery was the assault itself, and petitioner was thus entitled to immunity from prosecution for bribery.

Petitioner's right to the assistance of counsel under the Sixth Amendment was also violated by the denial of his request to consult with counsel outside the grand jury room immediately before testifying. The grand jury proceeding is a critical stage of the criminal process because substantial legal rights can be affected. In this case petitioner was greatly prejudiced by the denial of his request for the advice of counsel. Given the vagaries and pitfalls of the New York immunity statute, only his lawyer could have adequately counseled petitioner as to the many possible consequences of his testifying to the assault on Jack Graham. His lawyer could have clarified the scope of protection to which the prosecutor believed petitioner was legally entitled and could have negotiated for even greater protection, if necessary. That petitioner now stands before this Court having been convicted of bribing the police officer who arrested him for the assault to which he testified before the grand jury amply demonstrates that the only legal advice he did receive—the District Attorney's assurance that he was "fully protected"—was not only insufficient but misleading.

ARGUMENT

Point I

PETITIONER'S INDICTMENT BY THE SAME GRAND JURY BEFORE WHICH HE WAS COMPELLED TO TESTIFY WAS IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS.

After having testified before a Kings County Grand Jury investigating the assault on Jack Graham and "conspiracies arising therefrom," petitioner was indicted by the same grand jury for the crime of bribery of the police officer who had arrested him for the assault. It is evident from the statements which petitioner was compelled to make before the grand jury that his testimony was used by the grand jury as a basis for return of the indictment against him. The indictment should have been dismissed as it was obtained in violation of his privilege against self-incrimination.

In *Malloy v. Hogan*, 378 U.S. 1 (1964), the Court held that the Fifth Amendment's privilege against self-incrimination applied to the States and that whether the privilege has been violated is to be determined by reference to federal constitutional standards. 378 U.S. at 11. These standards, as earlier decreed by the Court, have established that the privilege extends to any testimony that would support a criminal conviction, would furnish a link in the chain of evidence against the witness, or would tend to show that the witness had committed a crime. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); 1 *Burr's Trial* 254 (1879 ed.). The Court has also held that the protections afforded by the privilege are not restricted to the trial stage of the criminal process but are also operative as to grand jury proceedings. *Counselman v. Hitchcock, supra*, 142 U.S. at 563.

Thus, once testimony has been compelled from a witness, its use as the basis for an indictment should be precluded in the same manner as its use at the trial proper would be. Any other result would impose upon an individual the necessity of experiencing anxiety and expense and possible pre-trial incarceration in order to defend himself against a prosecution instituted upon a violation of his Fifth Amendment rights. Such a process would demean the spirit of the grand jury system itself, which this Court has stated is designed "to stand between the prosecutor and the accused" [*Hale v. Henkel*, 201 U.S. 43, 45 (1906)], and which is intended to prevent an individual from subjection to such consequences without being first properly charged. *Hurtado v. California*, 110 U.S. 516, 552 (1884) (Mr. Justice Harlan, dissenting).

Because of the sanctity of the indictment process, this Court has often ruled that an indictment must be dismissed where the grand jury venire was empanelled under discriminatory practices which violate the equal protection clause of the Fourteenth Amendment. *Norris v. Alabama*, 294 U.S. 587 (1932); *Cassell v. Texas*, 339 U.S. 282 (1950); *Eubanks v. Louisiana*, 356 U.S. 584 (1958). A violation of the Fifth Amendment should stand on no different footing and similarly taints the Grand Jury process.[5]

---

[5] Many state courts have routinely held that to fully effectuate the privilege against self-incrimination an indictment obtained in violation thereof must be dismissed. *Salyers v. Commonwealth*, 274 Ky. 284, 287, 118 S.W.2d 208, 210 (1938); *State v. Corteau*, 198 Minn. 433, 270 N.W. 144 (1936); *State v. Sly*, 63 S.D. 162, 257 N.W. 113 (1934); *State v. Sarcone*, 96 N.J.Super. 501, 513, 233 A.2d 406, 412 (Super. Ct. N.J. Law Div. 1967); *Jenkins v. State*, 65 Ga. App. 16, 23, 14 S.E.2d 594, 598 (1941); *Commonwealth v. Kilgallen*, 379 Pa. 315, 325-326, 108 A.2d 780, 787 (1954); *State v. Naughton*, 221 Mo. 398, 120 S.W. 53 (1909); *State v. Jennison*, 240 La. 787, 791, 125 So.2d 363, 364 (1960); *People v. Bermel*, 71 Misc. 356, 128 N.Y. Supp. 524 (Sup. Ct. Queens Co. 1911); *People v. Schneider*, 133 Colo. 173, 292 P.2d 982, 986 (1956). See Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 390; 38 A.L.R.2d 237, 294 (1954).

In this case, an indictment was returned by the same grand jury which heard petitioner testify to acts which constituted the underlying basis of the crime for which he was indicted; there is no basis for the majority's conclusion below that the matter to which he was required to testify did not affect the finding of the indictment.

First, petitioner furnished the grand jury the motive for the crime set forth in Patrolman Sewell's testimony. Indeed, Sewell never even advised the grand jury of his own knowledge that petitioner had committed the assault upon Jack Graham. It was petitioner who admitted to the grand jury that the assault had occurred and that he perpetrated it by using tire irons, thereby confirming to the grand jury that he had done the very acts which Sewell was bribed to conceal.[6]

Secondly, because petitioner corroborated Sewell's testimony in many specifics, his testimony made the latter's testimony eminently credible. For example, Sewell testified that petitioner had told him that he and LaBello had met someone in a diner who had offered them money to commit the assault and had driven them to the scene of the assault. Sewell also testified that petitioner admitted hitting Graham with the larger tire iron, while LaBello used the smaller. These facts had all been testified to by petitioner four days earlier. Petitioner further corroborated Sewell's testimony as to his opportunity to make the bribe offer on the night of his arraignment, since he acknowledged having been released on bail. The grand jury was entitled, of course, to

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[6] Although motive, as distinguished from criminal intent, is not a necessary element of the crime of bribery under New York law (former P.L. § 378)—or in fact of any crime—evidence of motive would undoubtedly make prosecution and conviction more probable. Consequently, testimony bearing upon motive would seem to be fully covered by the protections of the privilege. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *United States v. The Saline Bank of Virginia*, 26 U.S. (1 Pet.) 100, 104 (1828).

believe Sewell without reference to the facts already testified to by petitioner. But it is not likely that they did. Indeed, it is much more probable that the coincidence of the patrolman's testimony with that given by petitioner furnished the grand jury strong reason to credit Sewell's testimony.

In addition, exceptional significance must be accorded the fact that the grand jury which was to indict petitioner had the opportunity to evaluate his character and demeanor. It cannot be easily concluded that their evaluation of him may not have had considerable bearing on their appraisal of Sewell's testimony. As four members of the D.C. Circuit have observed:

> "Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. Even if he makes no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury." United States v. DeStefano, 213 F. Supp. 232, 234 (N.D. Ill. 1963). His having been brought there may arouse suspicion. His manner and voice may arouse suspicion. *Jones v. United States*, 342 F.2d 863, 868 (D.C. Cir. 1964).

Thus the conclusion of the majority below that "[w]hatever evidence may have been revealed by the appellant's testimony was wholly unsubstantial", that "the indictment was not the product of that testimony", and that "whatever testimony by appellant might be considered of some relevance to the bribery charge may properly be deemed harmless error" is not supported by the record.[1] Rather,

[1] We seriously doubt the constitutional legitimacy of a harmless error test as applied by the Court of Appeals where the privilege against self-incrimination is in issue. Since the privilege protects any testimony which may form only a link in the chain of evidence or which may in some manner lead to conviction, the extent and application of the privilege, and therefore immunity from use, does not depend upon either the importance, quality or materiality of the testimony in question. *United States v. Goldman*, 28 F.2d 424, 433

the dissenters, we believe, were correct in pointing out that "[i]t is not possible on this record, then, to insulate this testimony from the resulting indictment." Since there is a substantial likelihood that the indictment may have been partially based on testimony obtained in violation of the Fifth Amendment, the conviction should be reversed and the indictment dismissed under principles which this Court has enunciated in highly apposite situations. *E.g., Bachellar v. Maryland*, 396 U.S. 816 (1970); *Street v. New York*, 394 U.S. 576, 585-586 (1969); *Bruton v. United States*, 391 U.S. 123, 135-137 (1968); *Jackson v. Denno*, 378 U.S. 368, 389 (1964); *Stromberg v. California*, 283 U.S. 359, 367-368 (1931). Compare *Price v. Georgia*, __ U.S. __, 71 Cr.L. 3193, 3196 (decided June 15, 1970).

(D.Conn. 1928); see Gold, *Privilege Against Self-Incrimination in Federal Grand Jury Proceedings*, 24 Temp. L.Q. 395, 398 (1951). Nor does the application of the privilege depend on "an assessment of the information possessed by the government at the time of interrogation . . ." *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 81 (1965). If the evidence may be incriminatory, and if it may have been used in obtaining an indictment, the indictment must be dismissed regardless of the nature of the remainder of the evidence. *State v. Naughton, supra* fn. 5, 221 Mo. at 436, 120 S.W. at 60-63; *Commonwealth v. Kilgallen, supra* fn. 5, 379 Pa. at 327, 108 A.2d at 785; *State v. Sly, supra* fn. 5, 63 S.D. at 170, 257 N.W. at 117; *Jones v. United States*, 342 F.2d 863, 870 (D.C. Cir. 1964); *United States v. DiGrazia*, 213 F.Supp. 232, 233 (N.D.Ill. 1963).

Even if, *arguendo*, a harmless error rule was applicable, a situation where, apart from the statements of the defendant, the only proof is the testimony of a single police officer would not be one in which the improper admission of defendant's testimony would constitute harmless error.

Point II

THE INDICTMENT OF PETITIONER FOR A CRIME TO WHICH HIS COMPELLED TESTIMONY WAS DIRECTLY RELATED VIOLATED HIS PRIVILEGE AGAINST SELF INCRIMINATION AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS

A. To fully satisfy the requirements of the Fifth and Fourteenth Amendments, a grant of immunity must afford protection against indictment as to any transaction to which the compelled testimony relates.

The discussion in Point I of this brief assumed, *arguendo*, because of the peculiar circumstances of this case, that the Fifth and Fourteenth Amendments extended protection only against the actual use of compelled testimony in a criminal proceeding. However, this standard is constitutionally inadequate and petitioner was additionally protected by a total immunity from prosecution on the bribery charge, having been compelled to testify to matters relating directly thereto.

The Fifth and Fourteenth Amendments to the federal constitution require that no jurisdiction either federal or state compel testimony in the face of the privilege against self-incrimination without offering in exchange an immunity "coextensive with the privilege." *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892); *Brown v. Walker*, 161 U.S. 591 (1896); *Glickstein v. United States*, 222 U.S. 139, 141 (1911); *Murphy v. Waterfront Commission*, 378 U.S. 52, 54 (1964); *Malloy v. Hogan*, 378 U.S. 1 (1964).[8]

[8] Since the *Counselman* and *Brown* decisions, the issue of the scope of the immunity necessary has not squarely been presented to the Court. Rather, the Court's decisions have been primarily concerned with whether the privilege was properly invoked in the first instance, [see, *e.g.*, *Rogers v. United States*, 340 U.S. 367 (1951)], and with the application of the federal privilege where state action was involved [see, *e.g.*, *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958)]. This latter issue has now been

The New York Court of Appeals held in this case that the constitutional privilege could be abrogated if a witness was protected from the use of his testimony or any leads derived therefrom in any criminal proceeding against him.[9] Under the holdings of this Court such a limited view of the privilege is without basis, for the Constitution requires that a witness be given absolute immunity from prosecution for any matter or transaction to which the compelled testimony relates.

The transactional immunity standard was first enunciated by this Court in *Counselman v. Hitchcock*, *supra*, 142 U.S.

conclusively resolved in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964), holding respectively that the Fifth Amendment privilege applies to the states through the Fourteenth Amendment, and that a witness who claims the privilege in one jurisdiction has, at the very least, protection from the use of his compelled testimony or its fruits in a prosecution brought in another jurisdiction. *Malloy v. Hogan*, *supra*, 378 U.S. at 8; *Murphy v. Waterfront Commission*, *supra*, 378 U.S. at 79.

In *Ullmann v. United States*, 350 U.S. 422 (1956), the Court was faced with the question whether any immunity statute, or at least one which does not protect against the disgrace or infamy which may be attendant upon testifying, is constitutionally adequate. As in *Brown v. Walker*, 161 U.S. 591 (1896), the Court ruled that these consequences are not covered by the privilege. 350 U.S. at 430-431.

The more basic question, the scope of immunity which must be provided by the same jurisdiction which has compelled a witness to give up his privilege against self-incrimination, remains for resolution in this case. See, *Stevens v. Marks*, 383 U.S. 234, 244-245 (1966).

[9]The Court of Appeals has subsequently reversed itself on this issue. In *Matter of Gold v. Menna*, 25 N.Y.2d 475, 307 N.Y.S.2d 33 (1969), the court held that New York's immunity statute does provide for transactional immunity and that any language to the contrary in petitioner's case is overruled. However, the court noted that its decision in petitioner's case was nonetheless correct because it felt that petitioner had not been indicted for a transaction to which his testimony related. As the court thus held that petitioner's conviction was proper, the case has not become academic in its posture before this Court. See Appendix A.

547, and has not been departed from since, although some members of the Court have expressed doubts about its necessity. *Murphy v. Waterfront Commission, supra*, 378 U.S. at 92-93, 100, 106 (Mr. Justice White, concurring); *Stevens v. Marks, supra*, 383 U.S. at 249-250 (Mr. Justice Harlan, concurring in part and dissenting in part). What has happened to petitioner in this case should resolve those doubts in favor of the *Counselman* rule.

The *Counselman* litigation was the result of a Congressional investigation into bribery and corruption among members of the House of Representatives. In order to obtain testimony, Congress passed a bill providing for immunity as to transactions to which compelled testimony related. 11 Stat. 156. However, the act resulted in efforts by congressmen and others to testify and obtain the statutory immunity, and five years later new legislation was considered to avoid this problem. See Congressional Globe 37th Cong., 2d Sess. (1862), p. 364. The result was section 860 of the Revised Statutes (12 Stat. 333), which provided:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence or in any manner used against his property or estate, in any Court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture.

This Court held the statute unconstitutional because it did not protect a witness against the use of his testimony to search out other testimony or witnesses against him, and in so doing, stated what it deemed to be the extent of the protection afforded by the privilege:

> We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the

> perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment to be valid, must afford *absolute immunity against future prosecution for the offence to which the question relates.* . . . Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime and of sources of information which may supply other means of convicting the witness or party. *Counselman v. Hitchcock, supra,* 142 U.S. at 585-586 (emphasis added).

Thus the Court considered an immunity from the use of testimony to search out other testimony to be but one test of a constitutionally adequate immunity statute and concluded that transactional immunity was constitutionally required.[10]

The Court next considered the constitutionality of a federal immunity statute four years later in *Brown v. Walker, supra,* 161 U.S. 591. In response to the holding of *Counselman,* Congress had passed the Act of February 11, 1893, c. 83, 27 Stat. 443, which provided:

> But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise . . .

In analyzing this language in light of the standards of *Counselman,* this Court stated that "The inference from [*Counselman*] is that, if the statute does afford such immu-

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[10] In *Counselman,* it was argued that the "amnesty" provided by state statutes of which this Court approved (Virginia, Massachusetts and New Hampshire) was broader than the protection required by the federal constitution because of differences in constitutional language and that the broader standard should not be adopted as the federal rule. The Court rejected this contention. 142 U.S. at 586.

nity against future prosecution, the witness will be compellable to testify." 161 U.S. at 594. The Court reasoned that the purpose of the privilege was "to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure" and that "if no such prosecution was possible, in other words if his testimony operate as a complete pardon for the offense to which it relates, a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause [privilege against self-incrimination] in question." 161 U.S. at 595. Since the statute did in fact provide this protection, the witness was required to testify.

The four dissenting justices, far from finding that the immunity extended by the statute was excessive, were of the opinion that the scope of the immunity even as declared by the majority was not sufficiently broad. Thus, Mr. Justice Shiras, joined by Mr. Justice Gray and Mr. Justice White, felt that the immunity statute did not offer sufficient protection because (1) the protection must be against prosecution in the first instance and the immunity offered could only provide a defense to an indictment, (2) the witness was subjected to the dangers of a perjury prosecution, whether well-founded or not, and (3) the witness might still be subject to state prosecution. 161 U.S. at 621-623. Mr. Justice Field felt that in addition to protection from prosecution, a constitutionally adequate immunity statute must protect a witness from infamy and disgrace. 161 U.S. at 631.

Even prior to this Court's holding in *Malloy v. Hogan*, *supra*, 378 U.S. 1, the large majority of state legislation[11]

[11] It is noteworthy that New York is one of those states which has traditionally afforded transactional immunity. Earlier New York legislation provided for immunity only from use of the compelled testimony itself. *People v. Kelly*, 24 N.Y. 74 (1861). However, following the *Counselman* decision, the New York statute was amended to provide transactional immunity. *Doyle v. Hofstadter*, 257 N.Y. 244, 177 N.E. 489 (1931). As the decision in *Matter of Gold v. Menna*, *supra* fn. 9, makes clear, the New York statutory scheme presently provides transactional immunity.

provided for absolute immunity against prosecution in language which has become typically known as transactional immunity ["immunity from prosecution for or on account of any matter or transaction to which the testimony relates"]. The same is true of almost all federal legislation.[12] See, *Ullmann v. United States*, 350 U.S. 422, 438 (1956); 53 A.L.R.2d 1030, 1032 (1957); 8 Wigmore, EVIDENCE, sec. 2281, p. 493 (McNaughton rev. 1961); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 Yale L.J. 1568, 1579 (1963); Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis L.J. 327 (1968). In addition, the Commissioners on Uniform State Legislation have suggested transactional immunity as the standard to be followed by the states. Model State Witness Immunity Act, 9 U.L.A. 186, *et seq.* (1957).[13]

This Court has recognized that the transactional immunity statute upheld in *Brown* "has become part of our constitutional fabric . . ." [*Ullmann v. United States, supra*, 350 U.S. at 438], and that standard has been frequently reaffirmed by this Court. *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *United States v. Murdock*, 284 U.S. 141, 149 (1931) ["The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."]; *United States v. Monia*, 317 U.S. 424, 428 (1943); *Smith v. United States*, 337 U.S. 137, 147 (1949).

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[12] Appendix B to this brief contains a listing of federal and state immunity statutes.

[13] The Commissioners have recommended adoption of this legislation as providing the bare minimum required by the federal constitution in light of *Counselman*. 9 U.L.A. at 195.

The rationale behind this rule is simple. If a witness is immune from prosecution, then his testimony can no longer incriminate him, and therefore the Fifth Amendment no longer applies. *Hale v. Henkel, supra,* 201 U.S. at 67; *Brown v. Walker, supra,* 161 U.S. at 597. This same analysis has been applied by the state courts in determining the validity of immunity statutes under state constitutional law.[14]

The soundness of the *Counselman* rule affording full protection is especially demonstrated by the circumstances of this case. At the time petitioner was called before the grand jury, the District Attorney already possessed evidence that he had committed bribery. In fact, such evidence had been available for a year. It is evident from the remarks of District Attorney Koota at sentence that the threat of punishment for the bribery had been used in an informal manner to compel petitioner to speak.[15] As other devices did

[14] See, *e.g., Ex Parte Cohen,* 104 Cal. 524, 38 Pac. 364, 365 (1894); *Hirsch v. State,* 8 Baxt. (67 Tenn.) 89, 92 (1874); *Doyle v. Hofstadter, supra* fn. 11, 257 N.Y. at 251; 177 N.E. at 491. See also, *People v. Boyle,* 312 Ill. 586, 600, 602, 144 N.E. 342, 348 (1924); *In re Watson,* 293 Mich. 263, 276, 291 N.W. 652, 657 (1940); *Brown v. State,* 233 Md. 288, 196 A.2d 614, 618 (1964); *State ex rel. North v. Kirtley,* 327 S.W.2d 715, 718 (Mo. 1936); *State v. Nowell,* 58 N.H. 314 (1878). See also 8 Wigmore, EVIDENCE, sec. 2281, p. 491 (McNaughton rev. 1961) ["A legislative provision, therefore, providing *amnesty for an individual offender* or class of offenders *who shall disclose the facts of the offense* upon inquiry is effective to remove the criminality of the offense, and the privilege thereby ceases as to the person so disclosing . . ." (emphasis in original)]; McCormick on Evidence, 135, p. 284 (1954) ["If at the time of the claim of privilege, the liability of the witness to be convicted of the offense inquired about has been terminated, the danger against which the privilege is directed does not exist, and the claim of privilege falls."].

[15] The District Attorney's attempts to compel petitioner to speak are amply evidenced by his remarks at petitioner's sentencing (R. 102-104):

> . . . It was perfectly obvious to me and to my associates, who were not altogether without experience in the field of criminal practice, that there was something behind this as-

not prove successful, the District Attorney resorted to the contempt power of the grand jury, giving in return what turned out to be an illusory grant of immunity. Not satisfied with petitioner's answers before the grand jury the Dis-

> sault [on Jack Graham] that was deeper and required further investigation.
>
> So we moved this assault case for trial, and the defendants pleaded guilty and were sentenced. Before the sentence, we asked the Court—it was Judge Barshay, I recall—to withhold the execution of the sentence to afford these defendants an opportunity to cooperate with me in my office, so that we could find out how high this thing went; who put these men up to committing this assault.
>
> . . . But they were intransigent. The sentence was executed, and we then brought them back to the grand jury and interrogated them in the grand jury, and there they told us a story that comes right out of Grimm's Fairy Tales.
>
> * * *
>
> Our attention had already come to the subject of the bribe, or attempted bribe that had been committed with reference to Patrolman Sewell, but in order to get at the bottom of this; to get at the higher-ups who were responsible for his assault, I would have gone to the extent of not prosecuting these individuals for the bribery, and give them immunity against that, if they would tell us who put them up to this; and I would have seen that clemency was exercised, if possible, even in the assault case, because it was more important for the interest of justice that we ascertain the identity of these individuals.
>
> * * *
>
> Now, we are confronted again with this question as to whether these men will tell us the identity of the person who put them up to this assault; but there is even something that is deeper at this moment than the identity of that individual, because we have some evidence that another person in the New York Housing Authority, whom I will not identify at the moment, endeavored to get Patrolman Sewell to accept the bribe that had been offered by these defendants and to go along with them in the attempt to kill this assault case, and it is the identity of this other individual and the part that he played in this attempted bribe that we are seeking to ascertain.
>
> * * *
>
> The sentence was on two weeks ago, as I understand it, and I think Mr. Schmier made our position clear. They had two weeks within which to come to us and tell us who was

trict Attorney, by having Patrolman Sewell testify, arranged to have petitioner indicted for bribery. This, after petitioner had been told he was being fully protected and after he had insisted that he had given all the information he had. Such an abuse of the use of the contempt power can be curbed only if the state is required to give, in exchange for compelled testimony, the fullest amount of protection at its disposal.

The protection afforded by the state when it chooses to deprive a man of his constitutional right to silence must be of the fullest and most effective sort. To compel a man to speak, and then prosecute him when his answers are unsatisfactory, as was done here, is an unconscionable abuse of governmental power. The Fifth Amendment privilege can be fully effectuated only if any aspect of criminality is removed from the compelled testimony and the witness is protected from prosecution for all matters relating to his testimony.

B. *The crime for which petitioner was indicted related directly to a transaction to which he testified, and therefore his indictment was barred by the immunity to which he was constitutionally entitled.*

Petitioner testified that he had committed and been arrested for an assault on Jack Graham with tire irons. Patrolman Sewell testified that he had arrested petitioner for the assault and had recovered the tire irons. He further testified that petitioner had offered him a bribe to destroy the weapons and change his testimony. The interrelationship between the matters to which petitioner testified and the

behind all of this, and they are mute. Their lips have been effectavely sealed.

I am going to ask that the Court, in view of all these circumstances, impose the kind of sentence to run in addition to the sentence that has been impose [sic] upon them for the assault . . .

crime for which he was indicted is patent and falls within the scope of transactional immunity to which petitioner is entitled.

In *Heike v. United States*, 227 U.S. 131 (1913), the standard to be applied in determining whether an indictment arises out of the same transaction concerning which testimony has been given was at issue. This Court found that

> [t]he evidence did not concern any matter of the present charge. Not only was the general subject of the former investigation wholly different, but the specific things testified to had no connection with the facts now in proof much closer than that they all were dealings of the same sugar company. . . . The mere fact that a part of the sugar embraced in the table was the sugar falsely weighed did not make the table evidence concerning the frauds. The same consideration shows that it did not tend to incriminate the witness. It neither led nor could have led to the discovery of his crime. 227 U.S. at 143.
>
> When the statute speaks of testimony concerning a matter it means concerning it in a substantial way. 227 U.S. at 144.

Unlike *Heike*, petitioner's testimony was substantially connected with the bribery charge. As the dissenting judges below pointed out,

> The relevancy of their testimony to the charge on which they were indicted is manifest. That they had committed the crime concerning which they sought to bribe the policeman not to testify was a basic premise of the bribery. The weapons they told the Grand Jury they had used were vital to the policeman's testimony that they had attempted to bribe him "to get rid of the evidence". (R. 121)

Thus, the underlying subject matter of the indictment was identical with the subject matter of petitioner's testimony. See *Lumber Products Ass'n v. United States*, 144 F.2d 546, 553 (9th Cir. 1944).

Further, petitioner's testimony supplied the motive for the bribery charge, and thus constituted a strong link in the chain of evidence against him. See *Smith v. United States*, 337 U.S. 137, 148-149 (1949).

Because of the substantial relationship between petitioner's testimony and the bribery for which he was indicted, petitioner was constitutionally entitled to immunity from prosecution for that bribery.

Point III

THE DENIAL OF PETITIONER'S REQUEST TO CONSULT WITH COUNSEL IN CONNECTION WITH HIS TESTIMONY BEFORE THE GRAND JURY DEPRIVED HIM OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

After petitioner was advised that he had been granted immunity he stated he would answer the questions but asked to speak to his lawyer first. He was told by Assistant District Attorney Panzarella that "there is no reason for your conferring with your attorney . . ." (R. 34). In view of petitioner's position at the time, the refusal to allow him to consult with counsel deprived him of needed legal advice at a critical stage of the proceedings and was thus a denial of his constitutional right to counsel.

This court has recognized the right to counsel at any critical stage of a criminal proceeding that is, whenever what occurs may affect what happens to the defendant subsequently. *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Wade*, 388 U.S. 218 (1967); *Coleman v. Alabama*, ___ U.S. ___, 7 CrL 3121 (decided June 22, 1970). The rationale of these decisions required that the right to counsel be extended to the grand jury proceedings as well. See, *The Supreme Court: 1963 Term*, 78 Harv. L. Rev. 143, 222; Meshbesher, *Right of Counsel Before Grand Jury*, 41 F.R.D. 189, 193-194.

A witness before a grand jury faces numerous choices which may substantially affect his future legal position. In the first instance he must decide whether to plead his constitutional privilege and when. His decision on this question may well determine whether he will be entitled to protection at all and if so, how much. *People v. Ianniello*, 21 N.Y.2d 418, 424-425, 288 N.Y.S.2d 462 (1968), cert. den. 393 U.S. 827. The questions of when the privilege must be pleaded and whether a particular response operates as a waiver are often difficult ones for the lawyer, let alone the layman.

Further, the witness, even if granted immunity, cannot be protected against non-criminal consequences which may flow from his testimony, such as loss of employment or deportation. *Ullmann v. United States*, 350 U.S. 422, 430-431 (1956); *Brown v. Walker*, 161 U.S. 591, 600 (1896). A witness is entitled to be fully aware of all the possible consequences of his testimony before he decides whether to accept the immunity grant or to risk a contempt conviction. The witness should also be fully aware of the possibilities of a perjury conviction should he answer falsely or a contempt conviction should he answer evasively, and the penalties which would result.[16]

Had petitioner been permitted to consult with counsel outside the grand jury room, the grand jury proceedings would in no way have been prejudiced. The purpose of secrecy in the grand jury is

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclos-

[16] Assistant District Attorney Panzarella never advised petitioner of his possible liability for perjury or contempt prosecutions.

> ures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt." *United States v. Procter & Gamble Company*, 356 U.S. 677, 681, n. 6 (1958), citing *United States v. Rose*, 215 F.2d 617, 628-629 (3rd Cir. 1954).

Also see 4 Wharton's Criminal Procedure, § 1719, p. 488 (1957); Meshbesher, *supra* at 207; Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 403.

None of these considerations would have been adversely affected by honoring petitioner's request. Petitioner did not ask the right to have counsel present either during the taking of testimony of other witnesses or during the deliberations and decisions of the grand jurors. All that he requested was the right to confer with his own lawyer during his own testimony concerning his rights. The refusal to permit him to do so advanced none of the purposes of grand jury secrecy and served only to deprive him of legal advice at a critical time.

Although New York allows a grand jury witness to consult with counsel [*People v. Iannielo*, *supra*, 21 N.Y.2d 418, 288 N.Y.S.2d 462],[17] the majority of the Court of Appeals found that petitioner's right to counsel had not been violated because his answers "did not form the basis of the present indictment", and thus petitioner had not been prejudiced.

[17] Several jurisdictions in addition to New York have recognized that the ability of a grand jury witness to consult with counsel is desirable. *United States v. Irwin*, 354 F.2d 192, 199 (2nd Cir. 1965); *Kitchell v. United States*, 354 F.2d 715, 720 (1st Cir. 1965); Utah Code Anno. 77-19-3. Also see *Sheridan v. Garrison*, 273 F. Supp. 673, 678 (E.D.La. 1967).

This was error because petitioner was clearly prejudiced by the denial of his request to consult with counsel. Given the confusion surrounding the meaning of the New York immunity statute, as evidenced by the fact that the Court of Appeals, in the short period of seven months, overruled its initial interpretation of the scope of the statute as applied to petitioner [compare the decision below with *Matter of Gold v. Menna, supra*, 25 N.Y.2d 598, 307 N.Y.S.2d 331], petitioner needed advice from his own lawyer as to the scope of his protection. Compare *Von Moltke v. Villies*, 332 U.S. 708, 725 (1948); *United States ex rel. Vanderhost v. LaVallee*, 417 F.2d 411 (2nd Cir. 1969), cert. den. *sub nom. McMann v. Vanderhost*, 397 U.S. 925 (1970). What in fact happened to petitioner, compared with Mr. Panzarella's bland assurances that petitioner was being "fully protected" and that he "cannot be prosecuted", is clear proof that counsel's advice was essential.

At the least, counsel could have conferred with Mr. Panzarella to determine what his intentions were with respect to the bribery charge of which all parties were aware, and whether the prosecutor considered that charge to be covered by the immunity grant. Even assuming the prosecutor did not consider petitioner entitled to immunity from prosecution for the bribery charge on the basis of his grand jury testimony, counsel may very well have been in a position to negotiate such protection with the district attorney. If in fact such discussions proved unfruitful, counsel could have made petitioner aware of the extent of the protection he would receive, so that he could have made an intelligent choice between testifying and subjecting himself to a contempt prosecution. Certainly in the face of Mr. Panzarella's misleading assurances, he could not make such a decision without the benefit of advice from counsel.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays that the judgment below be reversed.

Respectfully submitted,

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APPENDIX A

DECISION OF NEW YORK COURT OF APPEALS IN *MATTER OF GOLD v. MENNA*, 25 N.Y.2d 475 (1969)

Jasen, J. The primary issue in this case is whether a witness gains an immunity from prosecution for murder, even though such crime is not one of the offenses specified in the statute for which immunity may be conferred, where the Grand Jury is carrying on an investigation related to conspiracy to commit murder and other crimes.

The Fourth Additional Kings County Grand Jury of May, 1968 was impaneled to conduct an investigation into a conspiracy to commit murder and other crimes in the County of Kings in connection with an effort by unnamed persons to succeed one Joseph Bonanno as head of an organized crime syndicate.

On November 7, 1968, the appellants, having been previously subpoenaed, appeared before the Grand Jury and refused to answer any questions on the ground that their answers might be self incriminatory. The District Attorney, believing that the appellants could give useful evidence bearing on the conspiracy to commit murder and could identify some or all of the co-conspirators and perpetrators thereof, expressly asked the Grand Jury to grant each appellant immunity pursuant to sections 619-c and 619-d of the Code of Criminal Procedure. Thereafter, on the same date, November 7, 1968, appellants were granted immunity. However, they still refused to answer any questions. When they persisted in their refusal to answer, the District Attorney, by order to show cause, moved in Supreme Court, Kings County, for an order directing each of the appellants to return before the Grand Jury and answer all legal and proper questions propounded; or, in the event of a refusal to obey such direction, to show cause why each should not be punished for contempt pursuant to section 750 of the Judiciary Law.

Subsequently, in March, 1969, after appearing with counsel, the appellants were ordered by the court to return before the Grand Jury and answer the questions propounded. The witnesses once again refused to answer, and thereupon were adjudged in contempt of court in violation of section 750 of the Judiciary Law. Before being sentenced, they were given an opportunity to purge their contempt, which they refused.

Each appellant was sentenced to the Civil Prison of the City of New York for a term of 30 days and fined $250 or an additional 30 days in default of payment, with the exception of appellant Menna who only received a 30 day prison term. These appeals have been consolidated as they involve identical questions of law.

On this appeal appellants' primary argument is that the Grand Jury had no power to grant immunity in the pending investigation because the investigation centered on a series of murders and assaults, for which crimes the Grand Jury has no statutory authority to grant immunity.

Section 50-b of subdivision 3 of the Code of Criminal Procedure denominates, by reference to specific sections of the Penal Law, the offenses for which a Grand Jury may confer immunity; and murder and assault are not included. However, the statute does specifically provide for the conferring of immunity in the case of a Grand Jury investigation into a conspiracy to commit murder. (Code Crim. Pro., § 50-b, subd. 3; Penal Law, § 105.15.)

There is no doubt that the investigation here focused on such a conspiracy. The record discloses that the Grand Jury was investigating a series of incidents following, and possibly related to, the kidnapping of Joseph Bonanno on October 21, 1964, such as a shooting on Troutman Street, in Brooklyn, on January 28, 1966; the shooting of Frank Mari, in Brooklyn, in July, 1966; the murder of Thomas and James D'Angelo and Frank Telleri, in Queens, on November 10, 1967; the shooting of Peter Crociata, in Brooklyn, on March 4, 1968; the murder of Sam Perrone, in

Brooklyn, on March 11, 1968; the murder of Michael Consolo, in Queens, on April 1, 1968; the shooting of William González, in The Bronx, on April 5, 1968; the shooting of Francesco Crociata, in Brooklyn, on April 17, 1968; the murder of Thomas Zummo, in Queens, on February 5, 1969, and other related crimes.

In addition to the afore-mentioned murders, the Grand Jury was also investigating a number of shootings and assaults where the victims survived. Indeed, in those instances, the crime of conspiracy to commit murder may well have been perpetrated, although the completed crime of murder was not.

It is certainly proper and within the power of a Grand Jury to investigate these series of killings and assaults to determine whether they were committed in furtherance of a conspiracy to assume control of an organized crime syndicate in Kings County. Clearly, the statutory purpose of granting immunity to one person so as to gain evidence against others mandates that the Grand Jury be allowed to grant immunity here.

The fact that a crime, such as murder, which is not included in the statute may be mentioned by a witness testifying with immunity, should not change this conclusion. To be sure, there is always the possibility that in any Grand Jury investigation where immunity is granted, crimes not specifically enumerated in the statute may be revealed. However, to allow this fact to repeatedly void the grant of immunity would be illogical and contrary to the intent of the Legislature.

In *Matter of Grand Jury [Cioffi]*, (8 NY 2d 220 [1960]), we rejected a similar contention, stating at pages 225-226: "[A]ppellants say that they could not be compelled to testify under these circumstances because the Grand Jury was investigating crimes * * * which are not among the crimes as to which the Penal Law authorizes an express grant of immunity. The answer to that is that * * * appellants would have gotten complete immunity as to any and all crimes to which their testimony related."

As a subsidiary issue, appellants maintain that the immunity granted by the Grand Jury is limited and is, therefore, not coextensive with their privilege against self incrimination as required by *Counselman v. Hitchcock* (142 U.S. 547), where the court declared that "a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates" (p. 586). Assuming, because of the views expressed in *Gardner v. Broderick* (392 U.S. 273) and *Murphy v. Waterfront Comm.* (378 U.S. 52) that this may no longer be so, resolution of the issue would not affect the result under the statutes of this State. For, despite the statements to the contrary in *People v. LaBello* (24 NY 2d 598), the applicable immunity statute provides, in so many words, that a person, upon whom immunity is conferred, "shall not be prosecuted or subjected to any penalty * * * for or on account of any transaction, matter or thing concerning which * * * he gave answer or produced evidence" (Code Crim. Pro., § 619-c, subd. 2). The court has, indeed, expressly recognized that this Code provision and its identical provision in the former Penal Law (§ 2447), granted a transactional immunity from prosecution for any crime revealed by a witness' testimony before a Grand Jury. (See *People v. Iannello*, 21 NY 2d 418, 425, cert. den. 393 U.S. 827; *People v. Tomasello*, 21 NY 2d 143, 149; see, also, 1942 Report of N.Y. Law Rev. Comm., pp. 386-390; N.Y. Legis. Doc., 1942, No. 65 [I], pp. 50-54.) We now reaffirm this interpretation and hold that to whatever extent *People v. LaBello* (24 NY 2d 598, *supra*) is inconsistent with this conclusion, it is overruled.[1]

[1] This does not, however, mean that *LaBello* was incorrectly decided. On the contrary, the decision actually rested on the fact that the defendants in that case, according to the majority view, were not prosecuted in the language of the statute "for or on account of any transaction, matter of thing concerning which * * * [they] gave answer or produced evidence" (former Penal Law, § 2447, now Code Crim. Pro., § 619-c, subd. 2); in other words, they gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted.

In the present case, therefore, the appellants obtained an immunity from prosecution for any and all crimes to which their testimony might relate and, accordingly, they could not assert the privilege against self incrimination and refuse to testify. It follows that the orders adjudging them in contempt were eminently proper.

Also before us is the question of whether the appellants were entitled to a hearing on the relevancy of the questions asked them since the trial court ruled the questions asked were relevant without conducting a formal hearing. In *Matter of Kuota v. Colombo* (17 NY 2d, 147 [1966], cert. den. 384 U.S. 1001), we held that the relevancy of the questions need not be conclusively established and only an intelligent estimate of relevancy need be made. (See, also, *Matter of Spector v. Allen*, 281 N.Y. 251 [1939].)

Applying this test to the record before us, there can be no doubt that there is such an element of relevancy here. Appellants were asked if they knew the murder victims or Joe Bonanno. Since both the series of slayings and the conspiracy to succeed Bonanno were the subject of investigation by the Grand Jury, the *Colombo* standard has been clearly met.

The other contentions of the appellants are equally without merit. The question as to whether appellants are targets of this investigation is immaterial since this court has stated many times that a person has no right to remain silent after a grant of immunity even if one is the target of the investigation. (*People v. LaBello, supra; People v. Ianniello, supra; People v. Breslin*, 306 N.Y. 294 [1954].) The appellants' argument that they could not be punished for contempt because it was not committed in the immediate view of the court is also specious. Section 750 (subd. 3) of the Judiciary Law allows a court to hold a person in contempt for disobedience of its lawful mandate (i.e., to testify before the Grand Jury) and section 750 (subd. 5) allows punishment for failure to answer any legal and proper interrogatories.

Finally, appellants complain that they were illegally before the Grand Jury since they were not served with a subpoena to appear on the specific date on which they were held in contempt (although a subpoena had been issued earlier) as was required in *Matter of Spector v Allen* (*supra*).

Appellants' reliance on *Matter of Spector v Allen* (*supra*) is misplaced. *Spector* required a subpoena to be served because the court was concerned that a clear formal command to testify was not given under the facts of that case. Here the appellants were in fact served with a subpoena to appear before the Grand Jury. After refusing to answer questions put to them, they were granted immunity and again refused to answer questions. The court then formally ordered appellants to testify. After discussion with counsel, they informed the court that they would not answer the questions, at which time the court held them in contempt. We find that the appellants were afforded ample notice of the proceedings and fully apprised of the nature of the Grand Jury inquiry. Their fundamental rights were not violated.

Accordingly, the orders of the Appellate Division should be affirmed.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel and Gibson concur.

In each case: Order affirmed, without costs.

APPENDIX B

SURVEY OF STATE AND FEDERAL IMMUNITY-LEGISLATION

ALABAMA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Code of Ala.

Tit. 29, § 111	grand jury testimony violation of liquor laws
Tit. 48, § 67	public service commission

B. Immunity from use of compelled testimony.

Code of Ala.

Tit. 9, § 50	gambling and wagering contracts-interrogatories of parties in action for recovery of money

ALASKA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Alas. Stat. 1962 Anno.

Workmen's Comp., § 23.20.70	workmen's compensation board
Banks and Fin. Inst., § 06.05.020	hearings

B. Immunity from prosecution limited to subject matter of proceeding.

Alas. Stat. 1962 Anno.

Crim. Law, § 11.60.150	gambling prosecutions

ARIZONA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Ariz. Rev. Stats.	
Const. Art. 2, § 49	bribery prosecutions
§ 4-248	liquor laws
§ 40-244	public utilities and carriers
§ 44-1660	bucket shop prosecutions

ARKANSAS

A. Immunity from prosecution for transaction to which compelled testimony relates.

Ark. Stat. Anno.	
66-2122	insurance commission
66-3014	unfair trade practices and frauds
67-1253(d)	securities commission
73-228	public utilities
81-1114(j)	employment security act
84-105	public service commission property and privilege tax laws

B. Immunity from use of compelled testimony.

Ark. Stat. Anno.	
41-4120	treason prosecutions
70-310	defendant or witness for state in civil actions under unfair trade practices laws

CALIFORNIA

A. Immunity from prosecution for transaction to which compelled testimony relates.

West's Ann. Penal Code	
§ 1324	grand jury and criminal prosecutions
West's Ann. Bus. & Prof. Code	
§ 16758	restraint of trade proceedings
§ 17087	unfair trade practices proceedings
West's Ann. Gov. Code	
§ 9410	legislative hearings
§ 18677	civil service commission
West's Ann. Corp. Code	
§ 25531(c)	investigations into fraudulent securities practices
West's Ann. Ins. Code	
§ 764	unlawful rebates
§ 784	misrepresentation in policies
§ 1843	regulation of life insurance analysts
§ 11107	regulation of fraternal benefit societies
§ 12924(b)	insurance commissioner
West's Ann. Pub. U. Code	
§ 4637	regulation of for-hire vehicles
§ 5258	regulation of household goods carriers
West's Ann. Unemp. Ins. Code	
§ 1955	unemployment compensation hearings
West's Ann. Water Code	
§ 1106	state water resources control board

B Immunity from use of compelled testimony

West's Ann. Gov't Code

§ 9054 crimes against legislative power

COLORADO

A Immunity from prosecution for transaction to which compelled testimony relates

Colo. Rev. Stat. 1963

§ 7-3-19(4)	Marketing Act of 1939; commissioner of agriculture
§ 13-19-1-7(1)	funeral contract trust funds
§ 40-9-12	prostitution
§ 49-2-13	election law
§ 49-22-118	municipal election law
§ 49-24-16	other elections
§ 49-28-142	elections
§ 100-6-8	oil and gas conservation act
§ 12-9-3(20)	bingo and raffles licensing
§ 13-8-29	tax commission
§ 154-1-18	criminal proceedings generally

CONNECTICUT

A Immunity from prosecution for transaction to which compelled testimony relates

Gen. Stat. of Conn. (Rev. of 1958)

§ 31-98	board of mediation and arbitration labor relations
§ 31-108	labor relations act
§ 31-128(f)	commission on civil rights; fair employment practices
§ 52-358	testimony by mother in paternity proceedings

§ 53-276	gaming houses
§ 54-85	bribery at elections

B. Immunity from use of compelled testimony.

Gen. Stat. of Conn. (Rev. of 1958)

§ 17-2a	welfare department
§ 22-228	milk industry regulation
§ 30-8	liquor control act
§ 51-81	investigations of bar applicants
§ 52-398	enforcement of judgments; examination of judgment debtor

DELAWARE

A. Immunity from prosecution for transaction to which compelled testimony relates.

Delaware Code

11 Del. C. § 3508	any criminal action or grand jury investigation
18 Del. C. § 331	insurance code; hearings before commissioner
26 Del. C. § 187	public service commission

B. Immunity from use of compelled testimony.

Del. Const., Art. 5, § 7	election offenses (testimony of accused not compelled)

FLORIDA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Fla. Stat. Ann.

§ 366.09	public utilities commission
§ 443.12(10)	industrial commission—unemployment compensation

B G...

§ [illegible]	state fire marshal
§ [illegible]	liquor law violations
§ [illegible]	insurance commissioner
§ [illegible]	treason
§ [illegible]	bribery
§ [illegible]	instigation of litigation
§ [illegible]	prosecutions for bribery, burglary, larceny, gaming, liquor laws

B **Immunity from use of compelled testimony**

Ala Stat Ann

§ [illegible]	examination of judgment debtor (compelled to answer only questions which might incriminate as to fraud)
§ [illegible]	public service commission
§ [illegible]	national security investigations by federal officials

C **Immunity from prosecution limited to subject matter of proceeding**

Ala Stat Ann

§ [illegible]	election offenses
§ [illegible]	prosecutions for combinations in restraint of trade

GEORGIA

A **Immunity from prosecution for transaction to which compelled testimony relates**

Ga Code Ann

Tit [illegible] § [illegible]	public service commission

HAWAII

A. Immunity from prosecution for transaction to which compelled testimony relates.

Haw. Rev. Stat.

§ 431-54	insurance law
§ 708-8	conspiracies
§ 712-15	gambling

IDAHO

A. Immunity from prosecution for transaction to which compelled testimony relates.

Idaho Code

18-1308	bribery
23-807	alcoholic beverages
48-117	antitrust law
48-409	unfair sales act, parties to civil action

B. Immunity from use of compelled testimony.

Idaho Code

18-2204	duels

ILLINOIS

A. Immunity from prosecution for transaction to which compelled testimony relates.

Smith-Hurd Ill. Ann. Stat.

ch. 5, § 160	director of agriculture
ch. 38, § 106-1	any investigation or trial
ch. 38, § 203-14	investigation commission (no compulsion if reasonable chance of prosecution in other state or by United States)

[illegible]	department of revenue [illegible] fuel act
[illegible]	unemployment compensation
[illegible]	housing development authority
[illegible]	redevelopment commission
[illegible]	insurance solicitors
[illegible]	insurance code
[illegible]	commerce commission
[illegible]	department of revenue
[illegible]	cigarette tax act
[illegible]	cigarette use tax act
[illegible]	messages tax act
[illegible]	gas revenue tax act
[illegible]	public utilities tax

B Immunity from prosecution for matters revealed in testimony

Smith-Hurd Ill Ann Stat

ch [illegible]	uniform reciprocal enforcement of support testimony of obligee
ch [illegible]	abatement of public nuisances testimony of defendant

INDIANA

A Immunity from prosecution on account of answer given

Burns Ind Stat Ann

[illegible]	any criminal proceeding

B Immunity from prosecution for offense disclosed

Burns Ind Stat Ann

[illegible]	securities law

C Immunity from prosecution for any offense inquired about

Burns Ind Stat Ann

[illegible]	combinations in restraint of trade civil actions

D. Immunity from use of compelled testimony

Burns Ind. Stat. Ann.

29-3711	election offenses

IOWA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Iowa Code Ann.

96.11(10)	investigations by employment security commission
99B.5, 99B.10	prosecutions for gaming, lotteries, pools and trusts, gambling houses, liquor law violations, election law violations, soliciting political contributions, statement by voter regarding his qualifications, damage actions, and investigations and prosecutions under laws regulating common carriers, general assembly investigations, prosecutions against public officials for disclosing sealed bids, proceedings auxiliary to executions, examinations by board of control of state institutions, any investigation relating to public work, state tax commission, department of social services

KANSAS

A. Immunity from prosecution for transaction to which compelled testimony relates.

Kan. Stat. Anno.

17-1265(d)	securities commissioner
21-943	gambling
40-2413	investigation of unfair trade practices

44-714(i)	employment security law
50-129	bucket shop
50-156	antitrust laws
50-507	dairy products–unfair trade practices–civil action
60-1208(c)	actions to oust public officials
62-301	investigations into violations of gambling and liquor laws
65-1454	regulation of dentists and dental hygienists
66-114	investigation of public utilities rates
66-150	state corporation commission

B. Immunity from prosecution limited to subject matter of proceeding.

Kan. Stat. Anno.

50-110	prosecutions for restraint of trade
62-1428	gambling prosecutions

C. Immunity from prosecution for offense about which answers are evidence.

50-140	antitrust–civil actions

D. Immunity from use of compelled testimony.

46-109	legislative investigating commission
50-137	grain dealers–regulations against pooling–civil actions

KENTUCKY

A. Immunity from prosecution for transaction to which compelled testimony relates.

Kentucky Rev. Stat. Anno. (1969)

278.350	public service commission
436.510	gambling

B. Immunity from prosecution for offense under particular statute necessarily disclosed.

Kentucky Rev. Stat. Anno. (1969)

242.420	alcoholic beverage laws
432.070	criminal syndicalism and sedition
432.520	failure to protect prisoner
435.250	sending threatening letters
436.510	horse races, lotteries
437.140	conspiracy

C. Immunity from use of compelled testimony.

Kentucky Rev. Stat. Anno. (1969)

124.330	election laws

LOUISIANA

A. Immunity from prosecution for transaction to which compelled testimony relates.

West's La. Stat. Anno.—Rev. Stat.

23:1663	unemployment compensation
51:146	monopolies
51:426	civil actions to enjoin unfair trade practices—testimony of defendant
53:204	sabotage prosecutions

B. Immunity from use of compelled testimony

15:468	bribery

MAINE

A. Immunity from prosecution for transaction to which compelled testimony relates.

Maine Rev. Stat. Anno.

Tit. 10, § 1103	conspiracies in restraint of trade
Tit. 24, § 2916	insurance trade practices

Tit. 25, § 459	sabotage prosecutions
Tit. 26, § 1082(10)	employment security commission
Tit. 35, § 1517	accepting rebates on automobile insurance

B. Immunity from use of compelled testimony.

Maine Rev. Stat. Anno.

Tit. 12, § 3153	conservation laws participant's testimony
Tit. 12, § 4507	conservation laws fish and shellfish regulations testimony of any person

MARYLAND

A. Immunity from prosecution for transaction to which compelled testimony relates.

Anno. Code of Md.

Art. 48A, § 28	insurance commissioner
Art. 95A, § 12(j)	unemployment insurance laws
Art. 101, § 8(c)	workmen's compensation commission

B. Immunity from prosecution limited to subject matter of proceeding.

Anno. Code of Md.

Art. 27, § 23	bribery of public officials
Art. 27, § 24	bribery—athletic contests
Art. 27, § 39	conspiracy to bribe, gaming, lotteries
Art. 27, § 262	gaming
Art. 27, § 371	lotteries

C. Immunity from use of compelled testimony.

Anno. Code of Md.

Art. 33, § 231	elections

Art. 75, § 75	enforcement of judgments (compelled to answer only questions which might incriminate as to fraud)
Art. 81, § 360	hearing before comptroller
Rule 628, § c	examination of judgment debtor

MASSACHUSETTS

A. Immunity from prosecution for transaction to which compelled testimony relates.

Ann. Laws of Mass.

C. 3, § 28	legislative committees
C. 55, § 28	corrupt practices in elections
C. 93, § 7	antitrust laws
C. 94A, § 18(c)	milk control commission
C. 110A, § 16	public utilities commission sale of securities
C. 150A, § 7(3)	labor relations commission
C. 151A, § 43	director of division of employment security
C. 151B, § 3(7)	commission against discrimination
C. 175, § 183	insurance rebates
C. 176D, § 13	commissioner of insurance unfair competition
C. 271, § 39	bribery

B. Immunity from use of compelled testimony.

C. 64C, § 23	state tax commission cigarette excise tax

MICHIGAN

A. Immunity from prosecution for transaction to which compelled testimony relates.

Mich. Comp. Laws Anno.

29.7	fire commissioner
168.910	election laws
168.942	election laws
205.3(a)	department of revenue
205.69	general sales tax act
319.65	supervisor of wells–natural dry gas wells
421.9	employment security commission
451.807	uniform securities act
462.27	railroad regulation
487.18	financial institutions act
500.246	insurance code
500.2033	insurance trade practices act
600.2155	antitrust
750.125	bribery
750.157	conspiracy
750.334	incest
750.446	prize fights
750.453	prostitution
767.6	grand jury proceedings

B. Immunity from use of compelled testimony.

Mich. Comp. Laws Anno.

205.517	cigarette tax regulations
319.9	supervisor of wells–oil, gas and wells regulations
319.387	unitization law

MINNESOTA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Minn. Stat. Ann. (1964)

3.14	legislative investigations of bribery
30.45(4)	potato development commission
32A.05	department of agriculture–investigation of unfair trade practices
60A.04(29)	rehabilitation and liquidation act
72A.30	regulation of insurance trade practices
80.22	securities division
231.30	regulation of warehousemen
246.08	commissioner of public welfare
268.12(10)	department of employment security
297.09(4)	state commissioner of taxation–cigarette tax
297.37(4)	state commissioner of taxation–tax on tobacco products
325.49	unfair competition
609.09	criminal code of 1963–all prosecutions–applies to any law which compels testimony

B. Immunity from use of compelled testimony.

Minn. Stat. Ann. (1964)

575.04	examination of judgment debtor
617.325	prosecution for transporting for purposes of prostitution

MISSISSIPPI

A. Immunity from prosecution for transaction to which compelled testimony relates.

Miss. Code Ann. 1942 (Recompiled 1957)

1101	antitrust laws
2049-06	champerty and maintenance
2527	dueling
2529	bucket shop
2630	intoxicating liquors prosecutions
3337	legislative committee hearings
3365-08	general legislative investigating commission
6132-19(a)	state oil and gas board
7417	unemployment compensation
9028-41	state sovereignty commission

B. Immunity from prosecution limited to subject matter of proceeding.

Miss. Code Ann. 1942 (Recompiled 1957)

35	gambling and futures contracts
2531	lottery laws (testimony of purchaser may be compelled)
5861	game and fish act

C. Immunity from use of compelled testimony.

Miss. Code Ann. 1942 (Recompiled 1957)

2530	crimes against legislative power

MISSOURI

A. Immunity from prosecution for transaction to which compelled testimony relates.

Vernon's Ann. Mo. Stat.

136.100	state collector of revenue

386.470	public service commission
416.330	antitrust investigations
416.400	enforcement of antitrust laws

MONTANA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Montana Rev. Codes 1947 (1969 Repl.)

72-122	board of railroad commissioners
94-1617	extortion prosecution
94-2423	gambling

B. Immunity from prosecution limited to subject matter of proceeding.

Montana Rev. Codes 1947 (1969 Repl.)

94-811	bribery

C. Immunity from use of compelled testimony.

Montana Rev. Codes 1947 (1969 Repl.)

94-1307	dueling
94-2913	lobbying

D. Immunity from use of compelled testimony and direct fruits.

Montana Rev. Codes 1947 (1969 Repl.)

94-1471	election frauds

NEBRASKA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Reissue Rev. Stat. of Neb.

18-309	public officers receiving favors from public utilities
44-396	insurance law—trials or hearings

44-1521	unfair competition and trade practices
48-615	commissioner of labor
59-605	pooling by bridge contractors—civil actions
59-824	civil actions to enjoin unlawful restraints of trade

B. Immunity from use of compelled testimony.

Reissue Rev. Stat. of Neb.

28-707	bribery to secure paving contracts
28-960	bucket shop
28-1113	pooling combinations—grain dealers
59-402	lumber and coal dealers—unlawful combinations—civil actions
75-130	railway commission
77-1508	county board of equalization
83-114	investigations by director of public institutions

NEVADA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Nev. Rev. Stat.

522.100(1)	oil and gas conservation commission
612.280	unemployment compensation—proceedings before employment security department
704.530	public service commission—public utility regulation

B. Immunity from prosecution limited to subject matter of proceedings.

Nev. Rev. Stat.

465.050	gambling

C. Immunity from prosecution on account of testimony.

Nev. Rev. Stat.

178.572	criminal proceedings grand jury or trial

D. Immunity from use of compelled testimony.

199.090	bribery

NEW HAMPSHIRE

A. Immunity from prosecution for transaction to which compelled testimony relates.

N.H. Rev. Stat.

176:16	liquor commission
282:9(I)	department of employment security
356:6	combinations and monopolies
402:72	regulation of insurance companies
417:16	unfair insurance trade practices
516:34	criminal proceedings generally
589:6	sabotage prevention act

B. Immunity from prosecution for matters disclosed.

N.H. Rev. Stat.

15:7	lobbyists
68:9	ballot-law commission

C. Immunity from use of compelled testimony directly or indirectly.

N.H. Rev. Stat. 405:23	investigations of foreign insurance companies

NEW JERSEY

A. Immunity from prosecution for transaction to which compelled testimony relates.

N.J. Stats. Anno.

4:12A-17	milk control board
11:1-15	civil service commission
17:9A-263	banking act
17:29B-13	insurance trade practices
32:23-86	waterfront commission
43:21-11	unemployment compensation board
48:2-36	public utilities commission
49:1-19	securities law
58:1-29	state water policy commission

B. Immunity from use of compelled testimony.

N.J. Stats. Anno.

2A:87-2	abortion trial
2A:93-9	trial for bribery of labor representative
50:5-11	shellfish regulations
52:13-3	legislative investigations

NEW MEXICO

A. Immunity from prosecution for transaction to which compelled testimony relates.

N.M. Stats. 1953 Anno.

58-9-19	insurance regulation
59-9-11.9	employment security commission proceedings–unemployment compensation
64-27-40	corporation commission–regulation of motor carriers
65-3-7	oil conservation commission

B. Immunity from use of compelled testimony.

N.M. Stats. 1953 Anno.

40A-9-15	sexual offenses
40A-19-14	gambling
69-7-7	corporation commission hearings on railroad and communication rates

NEW YORK

A. Immunity from prosecution for transaction to which compelled testimony relates.

McKinney's Consol. Laws of N.Y.

Agric. & Mark. Law, § 33	any investigation
Banking Law, § 38(2)	any investigation
Bus. Corp. Law, § 109(b)	civil action by attorney general against corporation
Bus. Corp. Law, § 1209(b)	receivership proceedings
Canal Law, § 134(2)	investigations by commissioner of transportation
CPLR, § 5211	examination of judgment debtor
Code of Cr. Proc., § 619-c, 619-d	criminal proceedings generally
Conservation Law, § 1-0321	any investigation
Election Law, § 334	regulation of campaign expenditures
Executive Law, § 436	bingo control commission

Gen. Bus. Law, § 345	regulation of monopolies
Gen. Bus. Law, § 351-e	bucket shop prosecutions
Gen. Corp. Law, § 170(2)	receiverships of corporations
Insurance Law, § 25	hearings or proceedings
Insurance Law, § 40-A	insurance premium rebates criminal proceedings
Labor Law, § 708(4)	unfair labor practices investigations
Military Law, § 238-a(9)	damaging military or naval equipment criminal proceedings
Pub. Serv. Law, § 20(2)	public service commission investigations
Real Property Law, § 442-e(7)	regulation of insurance brokers
Unconsol. Laws, § 6464(2)	Port Authority hearings
Unconsol. Laws, § 8586(7)	rent control administration
Unconsol. Laws, § 8607	city housing rent agency

NORTH CAROLINA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Gen. Stat. of N.C.

14-354	influencing agents and servants
15-90	lynching—investigations and trial

18-8	enforcement of liquor laws
49-6	bastardy and support proceedings testimony of mother
58-54.13	unfair insurance practices
96-4(j)	employment security commission
163-198	election laws

B. Immunity from prosecution limited to subject matter of proceeding.

Gen. Stat. of N.C.

8-55	gambling, liquor laws
14-337	vagrancy, keeping bawdy house
18-27	liquor laws

C. Immunity from prosecution on account of testimony.

Gen. Stat. of N.C.

14-38	hazing, trials
75-11	investigations of corporations by attorney general

D. Immunity from use of compelled testimony.

Gen. Stat. of N.C.

1-357	supplemental proceedings against judgment debtor
16-2	gaming
116-44	licensing of amusements at University of North Carolina
153-9(30)	board of county commissioners–investigations

NORTH DAKOTA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Century Code Anno	
5-01-11	person arrested for intoxication testimony of source of liquor compelled
16-20-10	corrupt election practices
26-10-07	insurance company aiding political party
26-10-15	regulation of insurance agents
26-10-13	unfair insurance practices
38-08-12	control of gas and oil resources hearings before industrial commission
49-05-07	regulation of public utilities
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54-23-13	board of administration investigation into state institutions

B. Immunity from use of compelled testimony.

Century Code Anno	
12-19-27	offenses against public peace
19-03-26	narcotics violations (testimony in prosecution against another)
28-25-06	examination of judgment debtor
62-04-02	unlawful discharge of firearms

OHIO

A. Immunity from prosecution for transaction to which compelled testimony relates.

Page's Ohio Rev. Code Anno.

§ 101.44	legislative committee hearings
§ 2917.04	bribery of public official or referee
§ 4903.08	public utilities commission hearings

OKLAHOMA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Const., Art. 2, § 27	any criminal prosecution
15 Okl. Stat. Ann. § 599.14	unfair sales practices–civil action
21 Okl. Stat. Ann. § 951	gambling investigations
21 Okl. Stat. Ann. § 1265.6	criminal syndicalism–investigation or prosecution
40 Okl. Stat. Ann. § 221(j)	employment security commission–hearings
71 Okl. Stat. Ann. § 405(d)	securities administrator–investigations
85 Okl. Stat. Ann. § 104	workmen's compensation commission–investigations

B. Immunity from prosecution for matters revealed by testimony.

12 Okl. Stat. Ann. § 1600.20b	uniform reciprocal enforcement of support–testimony of obligor

C. Immunity from use of compelled testimony.

12 Okl. Stat. Ann. § 845	enforcement of judgments (compelled to answer only questions which incriminate as to fraud–exclusion in fraud prosecution)
21 Okl. Stat. Ann. § 564	civil actions–testimony showing evidence of debt received contrary to law
21 Okl. Stat. Ann. § 670	duels and challenges–investigations or trial
26 Okl. Stat. Ann. § 446	election offenses–bribery prosecutions

OREGON

A. Immunity from prosecution for transaction to which compelled testimony relates.

Ore. Rev. Stat. § 59.830	prosecutions for securities regulations violations
§ 167.520	gambling
§ 279.034	collusion in public contracts
§ 471.770	liquor control commission–investigations
§ 496.710	game law enforcement proceedings
§ 506.625	commercial fishing law enforcement proceedings
§ 757.590	utility regulations violations–civil actions
§ 760.605	railroad regulations violations–civil actions

B. Immunity from prosecution on account of testimony.

Ore. Rev. Stat.

§ 171.525	legislative committee hearings

C. Immunity from use of compelled testimony.

Ore. Rev. Stat.

§ 625.340	bakeries–advertising and trade practices–civil proceedings
§ 646.170	price discrimination–civil actions

PENNSYLVANIA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Purdon's Penna. Stat.

12 P.S. § 2243	examination of judgment debtor
19 P.S. § 640.3	organized crime or racketeering–any proceeding
35 P.S. § 2104	sabotage
40 P.S. § 280	insurance commission hearings–misrepresentation, rebates by agents
40 P.S. § 476	insurance commission hearings–misrepresentation by companies
43 P.S. § 211.10(d)	labor relations board–hearings
43 P.S. § 828	unemployment compensation board–hearings
43 P.S. § 957(g)	human relations commission–hearings
66 P.S. § 1402	public utility commission–investigations

B. Immunity from prosecution limited to subject matter of proceeding.

Purdon's Penna. Stat.

25 P.S. § 3326	testimony by unqualified voter concerning for whom he voted

C. Immunity from use of compelled testimony.

Purdon's Penna. Stat.	
Const., Art. 7, § 8	contested elections
18 P.S. § 2	bribery
18 P.S. § 2483	auction sales by trustee—civil proceedings
25 P.S. § 3467	contested elections
39 P.S. § 48	receiverships—examinations of insolvent and others
53 P.S. § 13378	city counsel—hearings

RHODE ISLAND

A. Immunity from prosecution for transaction to which compelled testimony relates.

General Laws of R.I.	
11-7-7	bribery of public officials
11-19-29	gambling prosecutions (testimony of participants)
18-9-12	investigations of charitable trusts
27-4-7	rebates on life insurance—investigations or trial
27-8-8	rebates on casualty insurance—investigations or trial
28-7-36	labor relations board—hearings
28-42-54	employment security—hearings
39-4-21	public utility regulations—public utility administrator—hearings
39-5-12	public utility board—hearings
39-12-34	regulation of motor carriers of property—public utility administrator—investigations

B. Immunity from use of compelled testimony.

General Laws of R.I.

8-9-18	examination of person suspected of withholding property of decedent estate or property of ward

SOUTH CAROLINA

A. Immunity from prosecution for transaction to which compelled testimony relates.

Code of Laws of South Carolina 1962

§ 24-146	regulation of electrical utilities—hearings
§ 37-1230	chief insurance commissioner—hearings
§ 58-445	regulation of telephone companies—public service commission—investigations
§ 62-307	uniform securities act—hearings
§ 66-54	antitrust proceedings
§ 66-115	general investigations of violations of laws by corporations
§ 68-70	employment security commission—investigations

B. Immunity from use of compelled testimony.

Code of Laws of South Carolina 1962

§ 10-1723	examination of judgment debtor (compelled to answer only questions which incriminate as to fraud)
§ 16-85	abortion prosecutions
§ 58-1257	general railroad law—civil actions

SOUTH DAKOTA

A. Immunity from prosecution for transaction to which compelled testimony relates.

South Dakota Compiled Laws 1967

61-3-8	unemployment compensation—hearings

B. Immunity from prosecution limited to subject matter of proceeding.

South Dakota Compiled Laws 1967

22-25-5	gambling
23-40-12	witness for state in any investigation or prosecution

C. Immunity from use of compelled testimony.

South Dakota Compiled Laws 1967

Const., Art. III, § 28	bribery of public officials
15-20-9	examination of judgment debtor (compelled to answer only questions which incriminate as to fraud)
22-12-5	attorney purchasing claim with intent to sue—civil actions

TENNESSEE

A. Immunity from prosecution for transaction to which compelled testimony relates.

Tenn. Code Anno.

3-319	legislative committee investigations
8-2707	investigations of public officials
39-4412	treason, disloyal conduct, sabotage
40-1823	grand jury testimony
50-1342	employment security law—hearings

B. Immunity from prosecution limited to subject matter of proceedings.

Tenn. Code Anno.	
2-2240	election law prosecutions

C. Immunity from use of compelled testimony.

Tenn. Code Anno.	
69-107	civil antitrust actions

TEXAS

A. Immunity from prosecution for transaction to which compelled testimony relates.

Vernon's Ann. Penal Code Art. 598	fire insurance laws—trials
V.A.P.C. Art. 978	violations of game, fish and oyster laws
Vernon's Texas Code Ann., Bus. & Corp. § 15.20	proceedings to discover and enjoin monopolies
Vernon's Ann. Civ. Stat. Art. 5429f(13)	legislative committee hearings
V.A.Civ.S. Art. 7446	antitrust laws

B. Immunity from prosecution limited to subject matter of proceedings.

V.A.P.C. Art. 639	gaming
V.A.P.C. Art. 652	horse racing pools
V.A.P.C. Art. 652a(7)	bookmaking
V.A.Civ.S. Art. 5205	discrimination against persons seeking employment

C. Immunity from prosecution on account of testimony.

V.A.P.C. Art. 1657	special rebates—transportation

UTAH

A. Immunity from prosecution for transaction to which compelled testimony relates.

Utah Code Anno. 1953

32-1-33	liquor control act, hearings
76-27-6	gaming
76-56-7	sabotage

B. Immunity from use of compelled testimony.

Utah Code Anno. 1953

76-16-6	dueling

VERMONT

A. Immunity from prosecution for transaction to which compelled testimony relates.

Vt. Stat. Anno. (1959 Rev.)

12 V.S.A. 1664	any prosecution or investigation into violations of criminal law providing for fine or imprisonment
13 V.S.A. 3436	treason prosecutions

VIRGINIA

A. Immunity from prosecution for any transaction to which compelled testimony relates.

Code of Virginia Anno. 1950

§ 4-94	regulation of sale of alcoholic beverages
§ 18.1-74.1.3	combinations to injure others in reputation or business—civil or criminal actions
§ 18.1-398	inducing litigation against the state
§ 29-181	game laws (witness for state)

§ 59.1-38	trusts and monopolies
§ 60.1-43	unemployment compensation commission

B. Immunity from prosecution limited to subject matter of proceeding.

Code of Virginia Anno. 1950.

§ 18.1-280	bribery of public officials
§ 18.1-405	corruptly influencing agent (witness for state)
§ 19.1-266	gambling prosecutions
§ 24-449	election laws

WASHINGTON

A. Immunity from prosecution for transaction to which compelled testimony relates.

Rev. Code of Wash. Anno.

10.52.090	in every criminal case where privilege abrogated
9.02.040	applied to abortion, drugs
9.05.050	applied to criminal anarchy
9.18.080	applied to bribery and corruption
9.30.050	applied to dueling
9.47.130	applied to conducting gambling, pool selling, bookmaking
21.20.380(2)	securities act
49.60.150	law against discrimination
50.12.120	unemployment compensation hearings

B. Immunity from use of compelled testimony.

Rev. Code of Wash. Anno.

Const., Art. 2, § 30	bribery and corrupt solicitation of public officials

§ 80.04.080	regulation of public utilities
§ 81.04.080	regulation of transportation

WEST VIRGINIA

A. Immunity from prosecution for transaction to which compelled testimony relates.

West Virginia Code of 1961

Const. Art. VI, § 45	bribery of public officials
§ 57-5-4	any criminal proceeding
§ 60A-2-28	liquor control commission

WISCONSIN

A. Immunity from prosecution for transaction to which compelled testimony relates.

West's Wisc. Stat. Anno.

13.35	legislative hearings
93.17	department of agriculture
97.04(10)	dairy, food and drugs regulations
111.07(6)	employment relations board, unfair labor practices
147.20(2)	civil actions to revoke medical licenses
180.09(4)	securities law—investigations or hearings
196.48	regulation of utilities
207.13	unfair insurance practices
885.24	actions by state to recover public monies or involving official conduct

885.25	civil actions by state against corporations to recover taxes, etc. (testimony of corporate agent)
885.34	criminal proceedings generally

B. Immunity from prosecution limited to subject matter of proceedings.

West's Wisc. Stat., Anno.

Const., Art. 13, § 11	participant in giving free passes or franks to public officers
176.40	intoxicating liquors

WYOMING

A. Immunity from prosecution for transaction to which compelled testimony relates.

Wyoming Stats. 1957 Anno.

§ 6-212	proceedings for destruction of gambling devices and to assist in prosecution of gambling
§ 26.1-40(a)	insurance code
§ 27-33(j)	employment security commission
§ 27-282(d)	occupational health and safety act
§ 37-35	public service commission regulation of public utilities
§ 39-36(a)	state director of revenue

B. Immunity from prosecution limited to subject matter of proceedings.

Wyoming Stats. 1957 Anno.

§ 22-360	election law

C. Immunity from use of compelled testimony.

Wyoming Stats. 1957 Anno.

Const., Art. 3, § 44	bribery of public officials

§ 1-415	examination of judgment debtor (compelled to answer only questions which incriminate as to fraud)
§ 6-205	gambling

FEDERAL LEGISLATION

Immunity from prosecution for transaction to which compelled testimony relates.

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7 U.S.C. § 87f	Grain Standards Act
7 U.S.C. § 222	Packers and Stockyards Act
7 U.S.C. § 499m(f)	Perishable Agricultural Commodities Act
7 U.S.C. § 2115	Cotton Research and Promotion Act
12 U.S.C. § 1820(d)	Federal Deposit Insurance Corporation
15 U.S.C. § 32	antitrust laws
15 U.S.C. § 49	Federal Trade Commission Act
15 U.S.C. § 77v(c)	Securities Act
15 U.S.C. § 78u(d)	Securities Exchange Act
15 U.S.C. § 79r(e)	Public Utilities Holding Company Act
15 U.S.C. § 80a-41d	Investment Companies Act
15 U.S.C. § 80b-9d	Investment Advisors Act
15 U.S.C. § 155(c)	China Trade Act
15 U.S.C. § 717m(h)	Federal Power Commission–regulation of natural gas
16 U.S.C. § 825f(g)	Federal Power Commission–regulation of public utilities
18 U.S.C. § 835(b)	Interstate Commerce Commission–investigations concerning explosives

18 U.S.C. § 895	extortionate credit transactions
18 U.S.C. § 1406	narcotics
18 U.S.C. § 2424(b)	White Slave Trade Act (immunity under federal laws)
18 U.S.C. §§ 3486 (a), (c)	internal security
19 U.S.C. § 1333(e)	Tariff Commission
26 U.S.C. § 4874	cotton futures tax.
26 U.S.C. § 7493	cotton futures tax
27 U.S.C. § 202(c)	Federal Alcohol Administration
29 U.S.C. § 209	Fair Labor Standards Act
29 U.S.C. § 521(b)	Labor-Management Relations Disclosure Act
42 U.S.C. § 405(f)	Social Security Act
42 U.S.C. § 2201(c)	Atomic Energy Commission Act
45 U.S.C. § 362(c)	Railroad Unemployment Insurance Act
46 U.S.C. § 827	Shipping Act
46 U.S.C. § 1124(c)	Merchant Marine Act
47 U.S.C. § 409(*l*)	Communications Act
49 U.S.C. § 43	Elkins Act
49 U.S.C. §§ 46-48	Interstate Commerce Act
49 U.S.C. § 305(d)	Motor Carriers Act
49 U.S.C. § 916(a)	Water Carriers Act
49 U.S.C. § 1017(a)	Freight Forwarders Act
49 U.S.C. § 1484(i)	Aviation Act
50 U.S.C. § 792	Subversive Activities Control Board
50 U.S.C. App. § 643a	war contractors investigations
50 U.S.C. App. § 1152(a)(4)	national defense contracts investigations

50 U.S.C. App. § 1896(f)(6)	rent control
50 U.S.C. App. § 2026(b)	Export Control Act
50 U.S.C. App. § 2155(b)	Defense Production Act

B. Immunity from use of compelled testimony.

United States Code

11 U.S.C. § 25(a)(10)	bankruptcy proceedings
49 U.S.C. § 9	damages action against common carrier

C. Privilege abrogated—no immunity provided by statute.

United States Code

2 U.S.C. §§ 192, 193	congressional investigations
8 U.S.C. § 1106	Joint Congressional Committee on Immigration and Nationality Policy

Argued by
STANLEY M. MEYER

Supreme Court, U.S.
FILED
JUL 29 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 97

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

October Term, 1970

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

Statement

This proceeding arises from the granting of a Writ of Certiorari to the Court of Appeals of the State of New York. The majority and dissenting opinions are re-printed at pages 113-123 of the Appendix and are reported at 24 N.Y. 2d 598. The majority and minority opinions of the Appellate Division of the Supreme Court of the State of New York appear at pages 107-112 of the Appendix and are reported at 30 A.D. 2d 664. The opinion of the Supreme Court of the State of New York, County of Kings, was not officially reported and appears in the Appendix at pages 65-66.

The petitioner, along with a co-defendant, Anthony LaBello, was convicted by a judgment of the Supreme Court of the State of New York, rendered January 19, 1966, upon

a plea of guilty entered during trial, of the crime of Attempted Bribery as a Felony, and was sentenced to 1½ to 3 years in prison. The sentence was to begin after the expiration of a previous sentence for Attempted Assault in the Second Degree of from 1 year 3 months to 2½ years which had been rendered on January 11, 1965.

Jurisdiction

The judgment of the New York Court of Appeals was entered April 24, 1969 (R.111).* The petition for a writ of certiorari was filed July 19, 1969 and certiorari was granted February 27, 1970. The jurisdiction of the Court is invoke pursuant to Title 28 of the United States Code, Section 1257(3).

Questions Presented

Appellant contends that his indictment by the same grand jury before which he was compelled to testify violated his privilege of self incrimination, that he was indicted for a crime concerning which he was required to testify after having been granted immunity and that the denial of his request to speak to his attorney while in the Grand Jury violated his rights.

Respondent answers that the crime for which appellant was indicted was not covered by the scope of the immunity afforded him, that sufficient evidence other than his compelled testimony supported the indictment, his testimony was not used against him and that even if his rights were technically violated by denying his request to see counsel, the error was not prejudicial and was harmless because none of his answers supported the indictment.

*References prefaced with the letter "R" are to the separate Appendix filed pursuant to Rule 36.

The Constitutional and Statutory Provisions Involved

United States Constitution, Amendments V, VI and XIV, Section 1.

New York Penal Law of 1909, Section 2447 (applicable to offenses committed prior to September 1, 1967).

1. "In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

NEW YORK CODE OF CRIMINAL PROCEDURE, Section 619-c (applicable to offenses committed after September 1, 1967):

1. In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall no be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence; and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

Facts

On March 19, 1964, petitioner and a co-defendant, Anthony Labello, were arrested for assaulting one Jack Graham at a housing project in Brooklyn, apparently with tire irons. The beating was believed to be at the direction of others, who paid Labello and Piccirillo. The investigation which later ensued resulted in various indictments secured by the New York County District Attorney involving a "painting scandal" in connection with property maintained by the New York Housing Authority (R-101-104).

On March 20, 1964, the day after the arrest, petitioner attempted to bribe Patrolman William A. Sewell, the Housing Authority Officer, who had seen the crime and had arrested the two men for the assault. He recovered the tire irons at the time of the arrest and the next day, in Criminal Court, was offered money to change his testimony and get rid of the weapons. A meeting was set up for that evening. The officer met with the two men, with minifon equipment, and the offer was made again (R-57-58). The defendants were not arrested on the bribery charge until after indictment, which was handed down on July 14, 1965, a year and a half later.

In the meantime, on January 11, 1965, Piccirillo and Labello were sentenced for the Attempted Assault charges after having pleaded guilty. They, thereafter, on March 18, 1965, while serving their jail sentences, were both called into the Grand Jury, were given immunity and were interrogated about the circumstances of the assault in an obvious attempt to learn who was behind the whole scheme, an attempt which proved fruitless. On March 22, 1965, Officer Sewell testified to the attempted bribery and on

July 14, 1965, the Attempted Bribery Indictment was handed down.

Both men pleaded guilty on August 9, 1965 but the pleas were later withdrawn on November 10, 1965.

A motion was made for an inspection of the Grand Jury minutes and for the dismissal of the indictment on the ground that the immunity afforded them in the Grand Jury during the investigation into the assault also extended to the Bribery charge, but their application was denied on December 13, 1965, by Hon. David L. Malbin, who also wrote an opinion. The Court held that the testimony given by defendants "could not be construed in the slightest degree that it offered a lead or suspicion" to the Bribery charge. That issue, and the scope of the immunity given was the issue on appeal.

After their applications were denied, the defendants pleaded guilty on December 17, 1965, during trial, and were sentenced as aforesaid on January 19, 1966.

POINT I

A state grant of immunity to a witness before a Grand Jury need only afford protection against the use of any compelled testimony or the fruits thereof to supplant the federal privilege against self-incrimination.

Petitioner argues that as a matter of federal constitutional law when a State seeks to supplant the privilege of a witness who refuses to answer questions which may incriminate himself, it must do so by virtue of an immunity statute which grants the witness what is generally known as testimonial and transactional immunity.

Petitioner relies greatly on the often discussed decision in *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892) as well as the other authorities and arguments alluded to.

If the federal constitution requires, as a minimum, that the immunity required is only a prohibition against use of the compelled testimony or any leads or fruits arising therefrom, then, unless as a matter of fact there is such a prohibited use in this case, as long as other evidence supported the Attempted Bribery charge, the present indictment was not barred. The interpretation of the second portion of the New York Immunity Statute, the portion affording transactional protection, is purely a matter of State construction of a State statute, involving no constitutional issues.

If, on the other hand, the United States Constitution requires that all Immunity Statutes provide testimonial and transactional immunity, then the question of the scope of the transactional portion is also a constitutional question to be determined by a uniform constitutional standard.

It is respondents position that *Counselman* is inapplicable to the case at bar and it has been or should be overruled. Respondent argues that this Court should hold that the Federal Constitution only requires that a witness be given immunity against the use of his compelled testimony or any leads or fruits arising therefrom and that if the States wish to provide greater protection, that protection is based on State considerations rather than on constitutional requirements.

The recent and celebrated case of *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964) should be viewed as fully deciding this question and squarely controling this case.

After reviewing the development in the law from the English cases until the time of *Murphy*, Mr. Justice Goldberg, writing for the Court, announced the Court's holding:

> ". . . we hold the constitutional rule to be that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. We conclude, moreover, that in order to implement this constitutional rule and accommodate the interests of the State and Federal Governments in investigating and prosecuiting crime, the Federal Government must be prohibited from making any such use of compelled testimony and its fruits. This exclusionary rule, while permitting the States to secure information necessary for effective law enforcement, leaves the witness and the Federal Government in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." *Murphy* v. *Waterfront Commission of New York*, *supra*, at 79.

Then at footnote 18, the rationale of the holding became even clearer when it was said that once a defendant demonstrated that he had been compelled to testify after a State grant of immunity to matters related to a federal prosecution, the burden was then on the United States to show that evidence arose from sources independent of the State proceedings.

Thus, it was apparent that what was intended was a rule of constitutional law that essentially placed a witness in the same position he would have been in had he still been able to plead his privilege, or had he not testified at all. The only rule that could accomplish this end was a rule prohibiting use of the testimony or fruits but allowing for prosecutions based on independent, untainted evidence. The witness would be in no worse position than had he been allowed to plead his privilege because he would have always been subject to prosecution based on other evidence anyway.

Since this Court made the Fifth Amendment applicable to the States in *Malloy* v. *Hogan*, 378 U.S. 1 (1964) and it specifically overruled the dual sovereignties concept of *Counselman* in the *Murphy* case, the concept that each jurisdiction was totally independent and that a witness before one jurisdiction could not refuse to answer a question on the grounds that he could incriminate himself in a second jurisdiction, the minimum immunity requirements must be applied universally.

Mr. Justice Harlan, in a concurring opinion, joined in by Mr. Justice Stewart, in *Stevens* v. *Marks*, 383 U.S. 234 (1966) reiterated that *Murphy* abolished the two sovereignties concept and it was also recognized that an expansive reading of the privilege could have a more profound impact than in the days of *Counselman*.

In addition, since the *Murphy* case, Circuit Judge Friendly, writing for the United States Court of Appeals for the Second Circuit, in *Uniformed Sanitation Men Association, Inc. v. Commissioner of Sanitation of the City of New York,* F. 2d (decided April 3, 1970), took the view that generally it has been thought that this Court has overruled *Counselman*, sub silentio, in *Murphy* and that use and fruits immunity was the minimum standard required by the constitution.

This was also the position taken by the New Jersey Supreme Court in *Zicarelli v. New Jersey State Commission of Investigation*, 55 N.J. 249 (1970) and as pointed out by Circuit Judge Friendly in *Uniformed Sanitation Men Association, Inc.*, it is the view that Congress has apparently taken when it passed Title II of the Organized Crime Control Act.

The same view was held by the United States District Court for the Southern District of New York in *United States ex rel. Ciffo v. McClosky*, 273 F. Supp. 604 (S.D.N.Y. 1967) and *Application of Longo*, 280 F. Supp. 185 (S.D.N.Y. 1967).

The discarding of the dual sovereignty concept, the decision in *Malloy making* the Fifth Amendment applicable to the States and the practical effect to be considered which would attend each of the different rules that could be applied, weaken the argument for the continued validity of *Counselman* and necessitate a rule such as respondent argues for.

The statement in *Counselman* that absolute transactional immunity was required to supplant the privilege was, as pointed out in *Murphy* and *Zicarelli*, dicta and not neces-

sary to the decision. Of greater importance, since the dual sovereignty concept was valid, the impact of *Counselman* was very limited. The Fifth Amendment did not apply to the States and regardless of what type of immunity the State gave, the federal government was not in any way bound. Even if no immunity were afforded at all, the federal privilege could not be pleaded in a state proceeding nor could the state privilege be pleaded federally. *Jack* v. *Kansas*, 199 U.S. 372, 381-382 (1905); *Hale* v. *Henkel*, 201 U.S. 43 (1906); *United States* v. *Murdock*, 284 U.S. 141 (1931).

Today, where the Fifth Amendment is available in a State proceeding and the concept of two sovereignties no longer exists, the basis upon which *Counselman* rested is no longer valid. Hence, the holding in that case must again be scrutinized. As pointed out in *Malloy*, this Court has never refrained from re-assessing old ideas and even discarding them when no longer valid.

This, of course, was done in *Murphy* and the new rule was announced.

The practical considerations are also vital and dictate a use plus fruits requirement only.

In the concurring opinion by Mr. Justice White, joined in by Mr. Justice Stewart, in the *Murphy* case, it was dramatically pointed out that if the Court adopted a transactional rule as a constitutional requirement, it would invalidate the immunity statutes of all 50 States because since the States were powerless to grant federal transactional immunity even if the Constitution required it, a witness could never be made to give up his federal privilege of self-incrimination. Serious in-roads into law enforcement and the administration of justice would be made.

The justice said that the Court was not adopting such a rule and the following idea was put forth:

> "In reaching its result the Court does not accept the far reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions, but also *absolute immunity* in these jurisdictions *from any prosecution pertaining to any of* the testimony given." (Emphasis supplied) *Murphy* v. *Waterfront Commission of New York*, *supra*, at 92-93.

The opinion added at page 93 that if the Court had adopted a "Counselman" rule of absolute transactional immunity it would:

> ". . . invalidate the immunity statutes of the 50 States since the States are without authority to confer immunity from federal prosecutions, and would thereby cut deeply and significantly into traditional and important areas of state authority and responsibility in our federal system. It would not only require widespread federal immunization from prosecution in federal investigatory proceedings of persons who violate state criminal laws, regardless of the wishes or needs of local law enforcement officials, but would also deny the States the power to obtain information necessary for state law enforcement and state legislation."

It should also be noted, that the concurring opinion, in pointing out the hardships that a transactional rule would entail, assumes that the States do not have the power to grant federal transactional immunity so that the continued availability to a witness of his federal privilege is the factor which destroys the State immunity statutes. But even looking at the

other possibility, if it could be held that a State transactional grant can bind the federal government transactionally, the effect is even more disastrous as far as effective law enforcement is concerned.

Thus, if in an obscure State investigation, unknown to the Federal authorities, a witness was called to testify, given immunity and responsively testified in part to transactions which might constitute or relate to major, serious, federal crimes, he could be forever sterilized against any type of federal prosecution for those crimes to which the testimony related. In such a way one government in a seemingly innocuous or unimportant proceeding could destroy, unknowingly, the power of the other government from ever taking action with respect to a particular individual.

The not impossible example comes to mind that if the United States, after a lengthy, protracted and expensive investigation had completed its case against an important criminal figure and was about to arrest or indict, but a State agency, unmindful of the contemplated federal action, had given the witness immunity, all of the effort of the United States could be made to count for naught.

In such a situation the only loser would be the public.

A Sovereign should be allowed to make its own choice whether it is willing to give up subsequent prosecution of an individual in exchange for the information sought and it is wrong to permit one jurisdiction to make that determination for another. That would be the result if complete immunity were required and it was held that one jurisdiction could bind the other.

Such a result would be disastrous to the federal system which is based upon the idea that each jurisdiction should

have the freedom to operate within its own sphere. A witness could thus achieve complete amnesty by admitting to crimes which were committed in a jurisdiction other than the one in which he testified and incentive would be created for corruption in the lower levels of a jurisdiction's administration. *Comment: In re Koota: The Scope of Immunity Statutes*, 61 N.W.L. Rev. 654, 660-661 (1966-1967).

It is absolutely essential, from the standpoint of not only the rights of witnesses, but from the point of view of effective law enforcement and the interplay of State-federal jurisdiction that the rule enunciated in *Murphy* be re-affirmed.

Such a rule is fair because it is truly co-extensive with the protection afforded by the constitution and leaves the witness in the same position as if he had never been compelled to testify.

New York, in giving this petitioner transactional immunity, gave him more than was necessary and its interpretation of its own statute was a matter of State statutory construction only.

Petitioner impressively cites statutes in each of the 50 states to argue that all of the States grant transactional immunity. This is done no doubt to suggest to this Court that if the States view their constitutions, which are generally similar to the federal constitution, to require transactional immunity, this Court should be persuaded to hold similarly.

Prior to *Counselman*, most states had only use immunity statutes, *Comment: Self-Incrimination in the Modern American Law*, 5 Temple L.Q. 368 (1930-31); *Comment: Federalism and the Fifth: Configurations of Grants of Im-*

munity, 12 U.C.L.A. L. Rev. 561 (1964-65), as did the federal government inasmuch as it was a use statute only, not even extending to leads or fruits, which was overturned. The States, prior to *Counselman* had viewed such use statutes as being constitutional. *State* v. *Quarles*, 13 Ark. 307 (1853); *Ex Parte Cohen*, 104 Cal. 524 (1894); *Kneeland* v. *State*, 62 Ga. 359 (1879); *Wilkins* v. *Malone*, 14 Ind. 153 (1860); *Ex Parte Buskett*, 106 Mo. 602 (1891); overruled sub silentio, *Ex Parte Carter*, 166 Mo. 604 (1902); *People ex rel Hackley* v. *Kelly*, 24 N.Y. 74, rev'd *People ex rel Lewisohn* v. *O'Brien*, 176 N.Y. 253 (1903); *LaFontaine* v. *Southern Underwriters*, 83 N.C. 133, overruled sub silentio *Smith* v. *Smith*, 115 N.C. 386, 387-88 (1895); *Bedgood* v. *State*, 115 Ind. 275 (1888); *Ex Parte Rowe*, 7 Cal. 184 (1857); *Higdon, Heard*, 14 Ga. 255 (1853).

It was only because of the absolute immunity statement in *Counselman* and not because of any deep-seated feeling on the part of the States that the statutes were thus changed and the uniformity of State statutory law as shown in petitioner's appendix B to his brief came about. *Ex Parte Cohen*, 104 Cal. 524, 529-530 (1894); Comment: *Federalization and the Fifth: Configurations of Grants of Immunity*, 12 U.C.L.A. L. Rev. 561 (1964-65); Comment: *State Immunity Statutes in Constitutional Perspective*, Duke L.J. Vol. 1968 p. 311, 322.

There can be little doubt that if the statutes were enacted pursuant to *Counselman* they cannot be relied on to suggest that the rule in *Counselman* still be adhered to for that would truly be putting the cart before the horse. If the rationale for *Counselman* is no longer appropriate than the statutes are to be considered as nothing more than State action providing to a witness more than is constitutionally

required. The compilation of State statutes also do not support petitioner's argument for the further reason that as can be seen, within each State, different statutes provide different types of immunity so that the legislatures were not always in agreement regarding what was required. The statutes of each State are also categorized in 8 *Wigmore, Evidence*, § 2281 fn. 11, which also indicates that there are even jurisdictions today, although in Canada, that do not grant transactional immunity in any event.

In *Zicarelli* v. *New Jersey State Commission of Investigation*, 55 N.J. 249, 261 A. 2d 129 (1970), the New Jersey Supreme Court upheld a New Jersey Statute, enacted after *Murphy*, which provided a witness with only use plus fruits immunity. N.J.S.A. 52:9m-17(b). The Court held that the constitution required the statute to go no further and it pointed out that the narrower ground for the *Counselman* holding was that the federal immunity statute in that case did not even prohibit using the compelled testimony to obtain leads. The more broad statement was not necessary to the decision and, the Court pointed out, it was made at a time when the Fifth Amendment was not applicable to the States. Of course, since *Malloy*, the Amendment is applicable and as the Court said:

> "In that setting, the scope of the required immunity assumes new significance. If the immunity must protect against prosecution with respect to any offense, both state and federal, to which the testimony relates, the states would be unable to compel testimony no matter how urgent the public need since they could not immunize a witness from federal prosecution." *Zicarelli* v. *New Jersey State Commission, supra*, at 138.

It was held that the most acceptable solution was to protect the witness against the use of his testimony by all jurisdiction but leave government free to prosecute on the basis of independent evidence.

It was also the view that the *Murphy* case had clearly changed the rule pronounced in *Counselman* insofar as it went further than actually was necessary to decide that case.

The Court said at page 140:

> *We are satisfied that the Fifth Amendment does not require immunity from prosecution.* An immunity of that breadth exceeds the protection the Fifth Amendment accords. More importantly, to find that demand in the Fifth Amendment would in practical terms deny state government access to facts it must have to meet its duty to secure the well-being of all the citizens. *We heretofore deemed the Constitution to require immunity aganist use of testimony rather than immunity from prosecution,* see *State* v. *Spindel,* 24 N.J. 395, 404-405, 132 A. 2d 291 (1957), and recently our Legislature, in adopting the Model State Witness-Immunity Act, substituted an immunity from use for an immunity from prosecution. See *In re Addonizio,* 53 N.J. 107, 114-115, 248 A. 2d 531 (1968).
>
> There is a difference in that *Murphy* dealt with a federal-state setting whereas we are here dealing with the claim that our statute does not protect a witness from prosecution under our state law. But the question in both is the same, *i. e.,* what immunity the Fifth Amendment requires in exchange for compulsion to answer. The values involved are the same. We see no sensible basis for a different answer. *Gardner* v. *Broderick* treated the issue as one and the same, citing both *Counselman* and *Murphy. Murphy* held and *Gardner*

repeated that the Fifth Amendment requires protection only from the use of the compelled testimony and the leads it furnishes, and that protection our statute expressly provides. *See United States ex rel. Ciffo v. McCloskey*, 273 F. Supp. 604 (S.D.N.Y.); *Application of Longo*, 280 F. Supp. 185 (S.D.N.Y. 1967). (Emphasis added)

In California, the same view was taken regarding the holding in *Murphy* as was taken in New York and New Jersey. In *Byers v. Justice Court for Ukiah Judicial District*, 80 Cal. Reptr. 553 (1969), cert. granted, *Byers v. California*, 38 U.S.L.W. 3405 (April 21, 1970) the Supreme Court held that *Murphy* and *Gardner v. Broderick*, 392 U.S. 273 (1968), stood for the proposition that complete immunity such as was discussed in *Counselman* was not required by the Constitution but that answers could be compelled as long as there was immunity from federal and state use of the testimony or its fruits.

The Court considered a section of the Vehicle Code, known as a "hit-and-run" statute requiring the disclosure of certain information, which might otherwise be privileged, in certain automobile accident situations. It held that the disclosures could be compelled but that the use—fruits protection was available to the person giving the information. In discussing *Murphy* and *Gardner*, the Court said at page 561:

> "This rule is the logical corollary of the rule that when information is the product of an involuntary disclosure secured in violation of the privilege the person disclosing the information is merely protected from prosecution on the basis of such information and the fruits thereof and not from any and all prosecution for offenses to which the information relates.

(E.g., Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L.Ed.2d 562; Miranda v. Arizona, 384 U.S. 436, 479 [majority opinion], 500, 522 [dissenting opinions], 86 S.Ct. 1602, 16 L.Ed.2d 694.)

Accordingly, if the disclosures compelled by section 20002 of the Vehicle Code and the fruits of such disclosures may not be used in a criminal prosecution relating to the accident, the requirements of the privilege against self-incrimination are met."

This was also the view taken regarding *Murphy* by Professor Mansfield in *The Albertson Case: Conflict Between The Privilege Against Self-Incrimination and the Government's Need For Information*, 1966 Sup. Ct. Review, 103, 164 (1966).

The Supreme Judicial Court of Maine joined New York, New Jersey and California in interpreting *Murphy* in *State v. Castonguay*, 240 A. 2d 747, 753 (1968) when it held that Maine, which had the same self-incrimination clause in its constitution as the federal Constitution, could not use statements which the defendant had been compelled to make in the federal courts during sentencing in a previous federal prosecution.

The Court said:

"Our case comes within the principle stated above. In the Federal Court, the defendant was 'compelled to give testimony' which might be incriminating under State law. The State may not use the compelled disclosure or its fruits. . . . In our view, indeed, he was entitled to answer the inquiries of the Federal Judge safe from harm in the State Court as a result thereof." *State* v. *Castonguay, supra,* at p. 753.

The Kansas Supreme Court agreed in dicta in *State ex rel. Londerholm* v. *American Oil Co.*, 202 Kan. 185, 190

(1968) and this Court again in *Miranda v. Arizona*, 384 U.S. 436, 460 (1966), recognized that our system of American criminal justice was only aimed at requiring the government to secure evidence by virtue of its own independent labors rather than by compelling it from the witness' own mouth. This purpose would only necessitate a use fruits prohibition.

If *Malloy* had not made the federal privilege applicable to the States, it could be argued that *Murphy* and *Counselman* were reconcilable in that *Counselman* set forth what was federally required under the Fifth Amendment but that *Murphy* described what would be the minimum necessary under the Fourteenth Amendment for the States to provide. But *Malloy* did come about and it is desirable and even imperative in consideration of the orderly administration of justice and federal state relationships, that the same constitutional principles be applied to what is essentially the same language in the Federal and most State Constitutions and as incorporated in the concept of due process. *Comment: Federalism and the Fifth: Configurations of Grants of Immunity*, *supra*, at 577.

POINT II

The evidence petitioner gave in the Grand Jury was not used against him. The indictment subsequently found did not relate to any thing or transaction he testified to.

Petitioner argues that his answers in the Grand Jury were used against him in part to secure the within indictment and also that the indictment concerned a "thing" or "transaction" as mentioned in the New York Immunity

Statute. If the New York Court of Appeals was wrong and the indictment did fall within the meaning of the words "thing" or "transaction" used in the immunity statute, it was barred if this court holds that transactional immunity is required by the Federal Constitution.

In discussing the first issue, whether his evidence was actually used, petitioner makes the argument that the use of his testimony consisted in providing the Grand Jury with, from his own mouth, testimony showing the background of and motive for the Attempted Bribery charge. This argument is advanced even though petitioner acknowledges that motive is not an element of the crime charged or of any crime under New York Law. (Petitioner's Brief, p. 15, fn. 6).

The record shows that petitioner's testimony did not relate to the Attempted Bribery charge in any way and, moreover, the testimony of Patrolman Sewell was complete in and of itself. It must be remembered that Sewell not only gave evidence about the bribe offer but he was also an eyewitness to the assault. He testified that he saw the assault occur, that he chased and caught the assailants and that they both admitted to him that they were hired to do in Jack Graham, the victim (p-55). No more evidence of background or motive was needed, and, in fact, when the trial began, Patrolman Sewell was the only prosecution witness that testified up until petitioner changed his plea to guilty (R72-91, 92-99). The evidence given before the Grand Jury by Patrolman Sewell covered every element of the crime charged, was sufficient in law to support the indictment and it could have supported a conviction after trial, had the plea not been interposed.

Any statements made in the Grand Jury by petitioner were cumulative at best, did not relate to the Attempted Bribery and added nothing to the People's case.

The New York Court of Appeals took the same view in its opinion herein wherein it concluded that:

> "There is no doubt that the police officer's testimony here was based on his personal knowledge as the recipient of the bribe offer and that the Grand Jury's indictment was completely based on that testimony. Nothing appellants said indicated that a bribery attempt had occurred. Whatever evidence might have been revealed by the appellants' testimony was wholly insubstantial. Therefore, even if it be assumed that appellants' testimony was related to the bribery, the indictment was not the product of that testimony. Consequently, appellants' Fifth Amendment rights were in no way violated by this indictment." (R-118)

The Grand Jury heard a great deal of questions asked not only of petitioner, but of his cohort, Anthony Labello, and the entire inquiry was focused not on a bribe incident, about which the Grand Jury then knew nothing, but it was an investigation which had as its sole aim, the unmasking of the people who paid for and directed the assault of Mr. Graham. The possible scandal in connection with the New York City Housing Authority was the real object of the Grand Jury's efforts (R-101-102), and they were not at all concerned with prosecuting this petitioner any further regarding the assault. That is obvious because they were willing to clothe him with immunity.

After the questioning ended, a few days later, when Patrolman Sewell testified for the first time, it is even

questionable if the Grand Jury could even recall the mention of the "tire iron" by Piccirillo and very brief acknowledgment that the assault had been committed. That testimony occurred at the beginning of lengthy inquiry into the more important areas the jury was concerned about and when that ended and a few days later Patrolman Sewell gave evidence, complete in itself and containing all the background and motive petitioner argues he supplied, it is apparent that the New York Court of Appeals was correct in deciding that no use had been made of petitioner's answers.

It seems to respondent that what happened here in this regard was more innocuous that the more common practice in some federal jurisdictions of subpoenaeing a potential defendant to a Grand Jury when that jury has already heard evidence against him, the only possible restriction being that he may have to be advised of his rights. Although such a practice would be illegal in New York, *People* v. *Laino*, 10 N.Y. 2d 161, (1961) it has been continually held that once the potential defendant is aware of his rights, it is his misfortune if he thereafter incriminates himself, even though he was a target of the investigation. *United States* v. *Irwin*, 354 F. 2d 192 (2nd Cir. 1965); *United States* v. *Winter*, 348 F. 2d 204 (2nd Cir. 1965); *United States* v. *Cleary*, 265 F. 2d 459 (2nd Cir. 1959); *Cardarella* v. *United States*, 375 F. 2d 222 (8th Cir. 1967); *United States* v. *Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967).

Some of the authorities also took the view that although the defendant's rights had not been violated, even if they had, the giving of no testimony of substance would make any happening non-prejudicial and the indictment would not have to be dismissed. *United States* v. *Irwin*, *supra*;

Cardarella v. United States, supra; United States v. Leighton, supra.

Thus, petitioner's argument that the mere violation of the right should in and of itself, even absent prejudice, lead to a dismissal of the indictment is not supported in law. See also *Chapman v. California*, 386 U.S. 18 (1967); *Coleman v. Alabama*, U.S. , 38 U.S.L.W. 4535 (decided June 22, 1970).

The issue of whether petitioner's testimony was used against him, like the issue of whether the Attempted Bribery prosecution arose out of a "transaction, matter or thing" concerning which he gave testimony are essentially questions of fact. The latter issue was also resolved against petitioner and in a later opinion by the New York Court of Appeals in *Matter of Gold v. Menna*, 25 N.Y. 2d 475, (1969) the holding in this case was further clarified in a footnote, when the Court, after overruling this case insofar as it had held that the New York statute provided only testimonial immunity, said:

> "This does not, however, mean that LaBello was incorrectly decided. On the contrary, the decision actually rested on the fact that the defendants in that case, according to the majority view, were not prosecuted — in the language of the statute — 'for or on account of any transaction, matter or thing concerning which * * * [they] gave answer or produced evidence' (former Penal Law, S. 2447, now Code Crim. Pro., S. 619-c, subd. 2); in other words, they gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." *Matter of Gold v. Menna, supra* at 481 (Appendix to Petitioner's Brief, A-4, Fn. 1).

The Court below examined the minutes of the Grand Jury and saw that the Assistant District Attorney told the petitioner that the Grand Jury was investigating the assault committed on Jack Graham and all conspiracies connected with the assault (R 32-33). Petitioner was also told that he could not be prosecuted on account of any answers they might give (R 33-34). Extensive interrogation was had and the petitioner gave answers, although apparently not satisfactory, concerning the circumstances of the assault and the events leading up to it (R 34-53). No mention of the attempted bribe was made and the weapons were discussed only insofar as the witness was asked to describe the assault itself, where the weapons were obtained and questions were asked of a similar nature. No mention of the name of Patrolman Sewell, the officer whom the petitioner offered the bribe to was made and the circumstances of the arrest or the arraignment the next day, when the bribe was offered, were not gone into in the slightest. Petitioner's contention is that because one of the things he offered Sewell money for was to lose the weapon and since the weapon was mentioned during the bribe offer, although in a totally different context, the mere fact that the weapons were mentioned or described makes the subsequent indictment invalid because the weapon was a "thing" testified to in the Grand Jury.

Such an argument stretches logic to the breaking point. The Attempted Bribery indictment was not based on the weapon and its essential elements did not depend in the slightest upon any evidence given by either defendant. Had petitioner admitted ownership of the weapons and then been prosecuted on a weapons charge or for an illegal possession violation then truly he would have been subjected to prosecution because of things revealed in his testimony.

Here, all the essential elements of the crime were included in the testimony of the officer upon whose evidence the indictment was based. The fact that petitioner possessed weapons with which he assaulted Jack Graham was nothing new but merely cumulative. This was already known, the petitioner had been indicted and had already pleaded guilty. No mention of the weapon would have to be made to sustain a bribery prosecution. Nothing was disclosed and it is the disclosure of facts not otherwise known or available which is the entire purpose behind calling witnesses to a Grand Jury and giving them immunity (*People ex rel. Hunt* v. *Fine*, 132 App. Div. 496, affd. 196 N. Y. 520 (1909); *People* v. *Cahill*, 126 App. Div. 391 affd. 193 N.Y. 232 (1908); *United States* v. *Onassis*, 125 F. Supp. 190 (D.C.D.C. 1954)). The witness only gets immunity regarding those matters actually testified to and not all things to which strained logic may lead (*People* v. *Fine*) 178 Misc. 1010 (S.C't. Orange Co. 1949). Broader interpretations than necessary to effectuate the purposes of immunity statutes should not be indulged in (*United States* v. *Nicholas*), 125 F. Supp. 214 (D.C.D.C. 1954).

The procedure followed by respondent and the Grand Jury in this case even in New York is not unusual in a proper case

> "The condemnation that has been asserted against the practice of calling the accused as a witness in the very proceeding in which the charge against him is being investigated (*People* v. *Ferola*, 215 N.Y. 285), if it has any relation to cases where immunity is intended to be and is granted, would not seem to be applicable to an inquiry directed in good faith towards establishing the commission of crimes by others." *People* v. *Reiss*, 255 App. Div. 509, 516, affirmed 280 N.Y. 539.)

The testimony of petitioner was not incriminatory nor did it reveal anything not previously known. The questions asked and the responses made were not reasonably connected with nor did they refer to the Attempted Bribery charge. The rationale of Mr. Justice Malbin's decision denying the motion below was a correct appreciation of the applicable law that under the facts of this case petitioner was not immune from the Attempted Bribery prosecution.

This would be true regardless of whether petitioner was entitled to transactional immunity as a constitutional principle or if he merely received it under State law. That is what petitioner received anyway under the laws of New York and that is what he was told he was getting (R-33-34). In fact, no impermissible use was made of his testimony and the Attempted Bribery prosecution did not emanate from his Grand Jury appearance.

If transactional immunity is not constitutionally required, but the minimum protection necessary is to be against use and fruits, still, this judgment should be affirmed because as we have argued, no such use was made. Not only did the New York Court of Appeals agree, but this view of the facts was taken initially by the lower court Justice (A-65-66) when it held:

> "The testimony furnished . . . could not be construed in the slightest degree that it offered a lead or suspicion that their testimony was related to the allegations set forth in this indictment" (R-66).

In that view, the question becomes nothing more than the application of the facts to a State statute which goes further than the Constitution requires and even if transactional immunity is necessary, the Attempted Bribery prosecution was still factually not within the scope of the immunity.

POINT III

The petitioner's right to counsel was not diluted. Even if technical interference existed it has no application to this case.

When Mr. Piccirillo appeared before the Grand Jury of Kings County he was told that the Grand Jury was investigating the assault on Jack Graham and any conspiracies in connection therewith. (R-32-33). The meaning of statutory immunity was explained and the prosecutor said he would ask the Grand Jury to vote him immunity. He also said that after it was granted the witness could not be prosecuted in any crimes that his answers connected him with (R-33).

The petitioner left the room and upon his return was informed by the foreman and prosecutor that he had been granted immunity (R-33). Then after saying that he would answer the question he said "I'd just like to speak to my lawyer." The prosecutor replied:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?"

Petitioner replied: "yes" (R-34) and thereafter he was questioned at length (R-34-53). No mention of the attempted bribe was made except that the tire iron was mentioned in that it was the weapon he was paid to use on the victim of the assault.

Respondent will be the first one to agree with petitioner that the right to counsel is extremely important and, de-

pending upon the circumstances, a witness in a grand jury should generally be permitted to consult with counsel who is presumably in the hallway unless it will unduly disrupt the proceedings.

Respondent submits however, that this principle does not apply to the case at bar. If the witness had been ultimately prosecuted for perjury or contempt it could be argued that had he been allowed to consult counsel he could have been advised that a proposed answer or course of action might be perjurious or contemptuous. It could then be said that counsel could have played a significant role and that the witness' desire to consult could be for other purposes than to seek aid in how to answer the question is an improper manner.

Where, as here, however, the prosecution is for a substantive crime not then under investigation and not fairly connected with the testimony, the violation of the right to counsel, if any, is irrelevant. It could make no difference since petitioner could not have asked his lawyer about things which were apart from the proceedings at that time.

In addition, the record shows that the request was not regarded as important by petitioner himself and the entire pattern of questions and answers shows that no real assistance was necessary or could have been given. When the only aid sought would or could have been in the answering of difficult or embarrassing questions, or where the attorney's advice is sought only for strategic purposes, the denial of the request should not be considered to be a denial of constitutional rights. *People* v. *Ianiello*, 21 N.Y. 2d 418, 426 (1968).

In the *Ianiello* case the New York Court of Appeals held that while the right to counsel was vital in a free society it

could not be manipulated for the only purpose of strategy or seeking aid in answering embarassing questions. In such a situation, where no harm resulted, the Court would not allow the privilege to be used as a shield and, even if it were violated, a dismissal of the indictment was not required.

In this case, the Court considered the question of a possible violation of Piccirillo's right to counsel and held:

> "Since Piccirillo's answers did not form the basis of the present indictment, his claim that his constitutional right to counsel was violated because he was not permitted to confer with his attorney is without merit. No prejudice did or could result for the attorney could have done nothing more for Piccirillo than to assure that he was given the immunity which in fact he did receive. Piccirillo's situation is to be distinguished from that of a witness who, denied permission to confer with his counsel, refuses to answer and is held in contempt. Such a witness might properly claim that, had he been given an opportunity to obtain advice from his lawyer, he would undoubtedly have testified, and thereby been spared a prosecution on a contempt charge." *People* v. *LaBello, supra* at 606 (R-119)

The petitioner goes even further than merely arguing that he should have been allowed to speak to his lawyer but he also contends that his attorney should have been permitted in the room.

The law always has been that a witness before a Grand Jury or other similar investigative body, does not have the right to have an attorney actually in the room, *Anonymous* v. *Baker*, 360 U.S. 287, 292 (1959); *Matter of Groban*, 352 U.S. 330, 333 (1957); *United States* v. *Scully*, 225 F. 2d

113, 115-116 (2nd Cir. 1955) cert. den. 350 U.S. 897; *Matter of Black*, 47 F. 2d 542, 543 (2nd Cir. 1931); *Battaglia* v. *United States*, 349 F. 2d 556, 560 (9th Cir. 1965); *People* v. *Ianniello, supra*; although the right to consult with his attorney who may be outside the chamber is really not in serious dispute. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 486 (1964); *United States* v. *Leighton, supra*, at 38; *United States* v. *Kane*, 243 F. Supp. 746 (S.D.N.Y. 1965); *United States* v. *Grunewald*, 164 F. Supp. 640 (S.D.N.Y. 1958; *People* v. *Ianiello, supra*; *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds 308 N.Y. 595 (1954).

Even Mr. Justice Black who dissented in *In re Groban, supra*, in an opinion joined in by Chief Justice Warren and Justices Douglas and Brennan, indicated that he would have joined the majority had the case involved the traditional 12 to 23 member Grand Jury, where there was less danger of abuse than in the situation actually before the Court, one of a single inquisitor.

Mr. Justice Black said that the need for counsel in the room was not as great where grand jurors were concerned:

> "They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community. They have no axes to grind and are not charged personally with the administration of the law. No one of them is a prosecuting attorney or law-enforcement officer ferreting out crime. It would be very difficult for officers of the state seriously to abuse or deceive a witness in the presence of the grand jury. Similarly the presence of the jurors offers a substantial safeguard against the officers' misrepresentation, unintentional or otherwise, of the witness' statements and conduct before the grand jury. The witness can call

on the grand jurors if need be for their normally unbiased testimony as to what occurred before them." *In re Groban, supra* at 347.

It would seem that the wisdom of these rules is still valid because if counsel were permitted in the Grand Jury room itself, constant objections to questions on the ground of relevancy, form or other privilege and constant requests for rulings from the Court sitting would unduly lengthen the Grand Jury's proceedings. There could be a serious roadblock to legitimate inquiry implanted by stalling or delaying tactics and since a Grand Jury never ultimately determines innocence or guilt and the sufficiency of its indictments are usually open to judicial scrutiny anyway, no harm is inherent in adhering to the prevailing rules.

The secrecy of the Grand Jury's proceedings could be seriously impaired because oftentimes the same attorney represents more than one witness during a particular investigation. The proceedings would essentially be changed in character from proceedings basically investigatory in nature to an adversary situation. This would pervert the historical purpose of the Grand Jury as a finder of fact and turn its proceedings into a pre-trial hearing. That sentiment was expressed in *Stallings* v. *State*, 154 Conn. 272 (1966), where it was thought that allowing counsel into the room would turn the Grand Jury's proceedings into nothing more than a preliminary trial and the dangers were forcefully and clearly noted by Chief Judge Fee in *United States* v. *Smythe*, 104 F. Supp. 283, 290-291 (N.D. Cal. 1952) and by District Judge Kirkpatrick in *In re Grand Jury Proceedings*, 4 F. Supp. 283, 284 (E.D. Pa. 1933).

Petitioner argues that the rationale of recent decisions of this Court in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961);

White v. *Maryland*, 384 U.S. 436 (1966); *Miranda* v. *Arizona, supra; United States* v. *Wade*, 388 U.S. 218 (1967) and *Coleman* v. *Alabama*, U.S. , 38 U.S.L.W. 4534 (Decided June 22, 1970) require the extension of the right to counsel to the Grand Jury Room.

Analysis of those authorities reveals that their holdings do not affect the long standing practice of excluding the attorney from the room itself. All of the Courts that have considered the problem have concluded that because the Grand Jury does not involve a situation where oppressive custodial interrogation in a police dominated atmosphere is present, the right to counsel should not be further extended to that situation. *United States* v. *Di Michele*, 375 F. 2d 959 (3rd Cir. 1967); *United States* v. *Goldenberg*, 276 F. Supp. 898, 900 (S.D.N.Y. 1967); *United States* v. *Wolfson*, 282 F. Supp. 772 (S.D.N.Y. 1967); *State* v. *Nelson*, 202 So. 2d 232 (Fla. 1968).

Judge Tenney pointed out in *United States* v. *Goldenberg*, *supra* at 900 that:

> "Neither *Escobedo* or *Miranda* is authority for the proposition that a witness before a Grand Jury is entitled to have counsel physically present with him in the Grand Jury room".

This Court also recognized in *Miranda* itself that the factors present in the police station were different than would attend other types of less overbearing inquiry.

> "As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other *official investigations*, where there are impartial observers to guard against intimidation or trickery". (Emphasis added) *Miranda* v. *Arizona, supra* at 461.

Contrary to the Alabama preliminary hearing in the *Coleman* case, Grand Jury proceedings are not a "critical Stage" of the prosecution because potential substantial prejudice to a defendant's rights does not exist. Grand Jury proceedings are not a confrontation, *Costello* v. *United States*, 350 U.S. 463 (1956); *United States* v. *Smythe*, *supra*, and since they only determine whether a man should be made to answer criminal charges, the prosecutor's case against him does not in any way benefit from what occurs in the Grand Jury. The proceeding only examines evidence already secured and does not result in the addition of anything new or the waiver or relinquishment of any rights or course of action otherwise available to a witness or defendant.

In the case at bar, since, as the New York Court of Appeals indicated, no prejudice resulted to petitioner because his answers were not the basis of the Attempted Bribery Indictment, it would have made little difference if the attorney was outside of or in the Grand Jury room with appellant. In either event, it would not have mattered.

This Court has held that even if error of constitutional magnitude is present, if no harm results, the error can be disregarded. *Chapman* v. *California*, 386 U.S. 18 (1967). In a recent case, *Coleman* v. *Alabama*, ___ U.S. ___; 38 U.S.L.W. 4535 (decided June 22, 1970), where the petitioner had been deprived of his right to counsel at a preliminary hearing, this Court decided that although it was a critical stage of the proceedings, still, a remand was appropriate to determine if there had been any prejudice. The law of Alabama prevented the use of anything said at the hearing without counsel and if no harm was apparent, the judgment would not have to be disturbed. *Chapman* was reaffirmed.

CONCLUSION

The New York Immunity Statute should be held to require, as a matter of Federal Constitutional Law, protection against the use of any compelled testimony and any fruits or leads arising therefrom. The judgment of the New York Court of Appeals should be affirmed.

Dated: Brooklyn, New York
July, 1970

Respectfully submitted,

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District Attorney
Kings County

STANLEY M. MEYER,
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Of Counsel.

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* The writer acknowledges the contribution to this brief made by two law students who could not sign the same due to the fact that they have not been admitted to the bar, Michael R. Klipper of George Washington University National Law Center and Rudolph E. De Meo of Cornell Law School.

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 97

RALPH PICCIRILLO,

Petitioner,

v.

NEW YORK,

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

POINT I

(Answering Respondent's POINT I pp. 7-20)

Respondent concedes that the rule in *Counselman v. Hitchcock*, 142 U.S. 547 (1892), would require the application of a transactional immunity standard to this case, but argues that in view of the extension of Fifth Amend-

ment protections to the states by *Mallov v. Hogan*, 378 U.S. 1 (1964), this traditional rule of immunity should be changed. It is surely a novel rule of constitutional law to say that where the protections of a constitutional provision have been extended to the states, the quality of that protection must therefore be diminished in order to accommodate conflicting state and federal interests.

Of course, the first and easiest answer to respondent's position is that the problems he suggests do not arise in the case at hand. This case does not deal with the effect of a state immunity grant on a federal proceeding, or upon proceedings in another state, but rather with the effect of a state immunity grant within the granting jurisdiction.

While we urge that this is a sufficient reply, should this Court determine to meet the question so broadly framed by respondent at this time, it can be dealt with easily without decreasing the traditional protection afforded by the Fifth Amendment.

Petitioner would readily concede that there is a serious question whether a state jurisdiction could constitutionally guarantee transactional immunity with respect to prosecutions in other jurisdictions. *Murphy v. Waterfront Commission*, 378 U.S. 52, 93 (1954). We also recognize that the interests of various jurisdictions may differ with respect to any particular witness or investigation. However, we submit that the only rule consistent with traditional principles of the Fifth Amendment would be one that would require the jurisdiction compelling the testimony to grant transactional immunity within its borders, while prohibiting other jurisdictions from using the compelled testimony or its fruits.

Respondent argues that a change in the traditional scope of protection afforded by the Fifth Amendment is necessary under *Mallov v. Hogan*, *supra*, because of a line in that decision which states that uniform standards under the Fifth Amendment must be applied to the states. 378 U.S. at 11. This sentence, in context, indicates nothing other than that uniform standards are to be adhered to when deciding

when the Fifth Amendment may properly be invoked by a witness. In fact, the uniform standard of *Malloy* was designed to insure that the full protections of the Fifth Amendment would be available to witnesses in all proceedings. It would be anomalous to now use that concept to limit the scope of that protection. Uniformity can be ensured by requiring each jurisdiction to protect its own witnesses from prosecution and by preventing each jurisdiction from using testimony (and its fruits) compelled by another jurisdiction.

Neither can respondent take comfort from the fact that *Malloy* overruled the dual-sovereignties doctrine. Respondent argues that since *Counselman* was decided at a time when the dual sovereignties concept was valid, its principles are therefore no longer applicable. In the first instance, this position is historically inaccurate. The *Counselman* decision makes no mention of the dual sovereignties concept, and there is nothing in that decision to indicate that its holding was premised on it. In fact, the first intimation of the doctrine's existence occurred in *Jack v. Kansas*, 199 U.S. 372 (1905), where the Court rejected an argument that a state immunity statute was constitutionally defective because it failed to grant immunity from federal prosecution. The decision in *Jack* appears equally based on the finding that the likelihood of a federal prosecution was remote [199 U.S. at 381], and it was not until *United States v. Murdock*, 284 U.S. 141 (1931), that the doctrine of dual sovereignties was clearly enunciated.* See also, Grant, *Federalism and Self-Incrimination*, 4 U.C.L.A. L. Rev. 549 (1957). Thus, the rule of *Counselman* was not, as respondent contends, specifically formulated during a

*As the court wrote in the second *Murdock* case, "Not until this Court pronounced judgment in *United States v. Murdock*, 284 U.S. 141 . . . had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law." *United States v. Murdock*, 290 U.S. 389, 396 (1933).

period when the dual sovereignties concept was in existence and therefore inappropriate in light of *Mallory* and *Murphy*.

Secondly, the overruling of the dual sovereignties concept was designed to extend the application of the Fifth Amendment, and should not now be used as a rationale for limiting its protection.

Respondent seeks to solve the problems he suggests by lessening the scope of protection traditionally afforded by the Fifth Amendment. As indicated above, his reasoning is not supported by either logic or precedent. Moreover, such a solution is not only contrary to the spirit of the Fifth Amendment, but is also unnecessary.

Full effectuation of the privilege, with due accommodation of potentially conflicting state and federal interests, requires no more than that the jurisdiction which has abrogated the witness' constitutional rights offer in return the fullest protection it can within its own borders, with other jurisdictions simply precluded from use of such compelled testimony or fruits thereof. *Murphy v. Waterfront Commission, supra*, 378 U.S. at 79; cf. *Elkins v. United States*, 364 U.S. 206, (1960). Such a rule would surely present no hardship for the jurisdiction which has compelled the testimony. Presumably that jurisdiction would be in a position to make a judgment as to the relative importance of the witness' testimony and of a prosecution against that witness. The jurisdiction would have full control over such a determination and, having intentionally determined to deprive a witness of his privilege against self-incrimination, it would bear the burden of making him whole. On the other hand, the jurisdiction which had not participated in this decision would not be bound by it except to the extent of being prohibited from using the compelled testimony or its fruits.

Nothing in the several opinions in *Murphy* and *Stevens v. Marks*, 383 U.S. 234 (1966), militates against this application of the Fifth Amendment. The concerns expressed by Mr. Justice White and Mr. Justice Stewart in *Murphy*,

and by Mr. Justice Harlan and Mr. Justice Stewart in *Stevens* applied only to inter-jurisdictional situations. As pointed out above, there is nothing in this Court's prior decisions which requires the application of a transactional immunity rule which would have extraterritorial effect.

If the Court is concerned with the inter-jurisdictional application of the Fifth Amendment at this time, a much more realistic result than the one respondent suggests is one which merely requires that that jurisdiction which has made a reasoned determination to abrogate a witness' constitutional rights be bound to fully protect that witness. In this way, the Fifth Amendment would retain its vigor and meaning, while an accommodation of the interests of different jurisdictions would be achieved.

However, although we believe that the rule set forth above is fully consonant with traditional interpretations of the Fifth Amendment and avoids the difficulties foreseen by the respondent, we reiterate that the instant case does not necessitate a consideration of the effect on other jurisdictions of a grant of immunity by one jurisdiction in our federal system. As pointed out in our main brief, the Fifth Amendment requires that the jurisdiction which has compelled immunity must grant the witness' transactional immunity. This was not done in this case, and therefore petitioner's conviction must be reversed.

POINT II

(Answering Respondent's POINT II pp. 20-27)

Petitioner has argued that his testimony was used by the Grand Jury in handing down the bribery indictment, or that there is a strong possibility that it was so used. In opposition to this contention, respondent has argued that "the testimony of Patrolman Sewell was complete in and of itself" because Sewell was an eyewitness to the assault and testified that "he saw the assault occur" (Resp. Brief, p. 21). This position is not well founded in the record.

A reading of Sewell's grand jury testimony reveals that he never testified concerning the assault. The only relevant testimony on this point was as follows:

> Q. Now, did an incident occur on that day which caused you to give chase and place under arrest one Anthony La Bello and one Ralph Picirillo.
>
> A. Yes.
>
> Q. Did you apprehend the two defendants?
>
> A. I did.
>
> (R. 58)

In fact, it clear from Sewell's testimony at the trial that he did not witness the assault at all. He testified as follows:

> At approximately between 9:15 and 9:30, I was standing in front of our headquarters. I saw a fellow run across the street, and I saw another gentleman coming across the same street covered with blood. The first fellow, as he came out, he said he just saw two men assault the man who was covered with blood, and he pointed them out to me. I immediately
>
> Q. Who was pointed out to you, if you now know.
>
> A. The two defendants.
>
> Q. Would you point them out and name them if you can.
>
> A. Anthony Labello and Ralph Picirillo.
>
> Q. How far were they from you at the time you first saw them?
>
> Q. They were running through the project, which is across the street, and a little ways into the project. (R. 73)

Thus, contrary to respondent's assertion, Sewell's testimony was not complete in and of itself. Even if it had been complete, however, petitioner's argument would not be any the weaker since it is based not upon the quality of Sewell's testimony but upon the high probability that the grand jury, in determining whether to credit Sewell's testimony and whether to indict, relied, in part, on the testimony of petitioner.

CONCLUSION

Wherefore, for the foregoing reasons, petitioner prays that the judgment below be reversed.

Respectfully submitted,

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PC

PICCIRILLO *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 97. Argued November 9, 1970—Decided January 25, 1971

Writ of certiorari, granted to resolve question whether "transactional" rather than "use" immunity is constitutionally required to compel a witness to testify before a New York grand jury, is dismissed as improvidently granted in light of another decision by highest state court holding that transactional immunity is required in New York and that its earlier decision in the instant case may have rested on that premise.

24 N. Y. 2d 598, 249 N. E. 2d 412, certiorari dismissed.

Malvine Nathanson argued the cause for petitioner. With her on the briefs was *William E. Hellerstein.*

Stanley M. Meyer argued the cause for respondent. With him on the brief was *Eugene Gold.*

PER CURIAM.

The occasion for granting the writ in this case was to resolve the important question whether it is necessary to accord "transactional" immunity, see *Counselman v. Hitchcock*, 142 U. S. 547 (1892), to compel a witness to give testimony before a state grand jury over his claim of the privilege against self-incrimination, or whether mere "use" immunity suffices to that end, see, *e. g.*, *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964); *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation of the City of New York*, 426 F. 2d 619 (CA2 1970).

After considering the briefs and oral arguments of the parties on this writ, we have reached the conclusion that the decision of the New York Court of Appeals in *Gold v. Menna*, 25 N. Y. 2d 475, 255 N. E. 2d 235 (1969), which makes clear that transactional immunity is required in New York and also indicates that such court's earlier

decision in the case before us, *People* v. *La Bello*, 24 N. Y. 2d 598, 249 N. E. 2d 412 (1969), may have rested on that premise, makes this case an inappropriate vehicle for deciding a question of such far-reaching importance.

With the intervening decision in *Gold*, no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, Piccirillo was entitled to "use" or "transactional" immunity. While it is true that, technically speaking, issues remain in the case concerning the kind of immunity required by federal law and, if it be "transactional" rather than "use" immunity in such a case as this, the proper scope of such immunity, both issues arise only against the sterile background of agreement between the parties that Piccirillo is entitled to "transactional" immunity under state law. Thus, our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance.

In this posture of affairs, we conclude that the writ of certiorari should be dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE BLACK dissents from the dismissal of this writ as improvidently granted. He would vacate the judgment below and remand the case to the New York Court of Appeals for reconsideration in light of its later opinion in *Gold* v. *Menna*, 25 N. Y. 2d 475, 255 N. E. 2d 235.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I do not approve dismissal of this writ as improvidently granted.

Petitioner was indicted for assault committed by the use of tire irons. He pleaded guilty and was sentenced

to imprisonment. Shortly thereafter a grand jury was impaneled to investigate the assault on the victim and the conspiracies arising in connection with it. Petitioner, while still serving the sentence on the assault conviction, was called to testify before the grand jury.

After refusing to testify, petitioner was granted immunity. He then testified to the assault which he had perpetrated by the use of the irons. Four days later a police officer testified before the grand jury that after a chase, he had arrested petitioner and another, and thereupon had taken the irons from them. The officer also testified that following petitioner's arrest petitioner had offered the officer a bribe to change his testimony. Petitioner was subsequently indicted by the grand jury for bribery, and, following an unsuccessful motion to dismiss based on the grant of immunity, he pleaded guilty to attempted bribery. The New York Court of Appeals held four to three that the New York immunity statute only prohibited use of testimony and the fruits of the testimony in a subsequent criminal proceeding and that the police officer's testimony was in no way derived from anything petitioner said. 24 N. Y. 2d 598, 249 N. E. 2d 412.

Counselman v. *Hitchcock*, 142 U. S. 547, held that once immunity was granted, it protected the witness against prosecution not only for a crime that relates to the precise testimony given but also for the fruits of such testimony. *Id.*, at 564-565. But the Court went further: "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offence to which the question relates." *Id.*, at 586. In *Brown* v. *Walker*, 161 U. S. 591, which involved another federal prosecution, the immunity statute provided that the witness would be protected "on account of any transaction . . . concerning which he may testify." *Id.*, at

594. The Court held that the immunity offered was coterminous with the privilege and that the witness could therefore be compelled to testify. Thus, "transactional immunity" became part of the fabric of our federal constitutional law. *See Ullmann v. United States*, 350 U. S. 422, 438.

Now that the Self Incrimination Clause of the Fifth Amendment is applicable to the States, *Mallory v. Hogan*, 378 U. S. 1, the same immunity against state prosecutions must be granted by the States as the Federal Government must grant against federal prosecutions. *Id.*, at 10-11.*

Subsequent to petitioner's case the New York Court of Appeals unanimously concluded that their statute provides transactional immunity. *Gold v. Menna*, 25 N. Y. 2d 475, 255 N. E. 2d 235. Nevertheless, that court also concluded that petitioner would not have benefited from the change of law because he gave no testimony which related to the offense for which he was prosecuted. *Id.*, at 484 n. 1, 255 N. E. 2d, at 238 n. 1. That approach to the problem is not in keeping with the generous interpretations which the Fifth Amendment has heretofore received by this Court.

Petitioner had just testified to the grand jury concerning facts which provided the underlying basis for the bribery charge. The grand jury knew petitioner had assaulted a man with tire irons because petitioner himself told them so. The tire irons were the "evidence" which according to the police officer petitioner had tried to bribe him "to get rid of." They were the same tire irons used in the assault for which he was convicted and sentenced, not tire irons used to commit another assault. Moreover,

*The present case is not complicated by the question whether state immunity must extend immunity against *federal* prosecution. *See Murphy v. Waterfront Comm'n*, 378 U. S. 52. *Cf. Abbate v. United States*, 359 U. S. 187.

the bribery charge grew out of conversations which petitioner had with the police officer the day of his arraignment on the assault charge. It seems obvious that, if the transactional test is to be honored, this is one of the clearest instances in which to do so.

Accordingly, I would reverse the decision below.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

This case presents the question of the limitations required by the Fifth Amendment's Self-Incrimination Clause upon subsequent state prosecutions of an individual compelled by the State to answer incriminating questions. Since, in my view, this case presents a record that compels us to decide that question, I cannot agree that the Court may dismiss the writ of certiorari as improvidently granted. I therefore reach the merits and would reverse the judgment of conviction and remand the case with directions to dismiss the indictment.

I

Petitioner and a codefendant were arrested on March 19, 1964, by a New York police officer, William Sewell, for assaulting one Graham, a housing contractor. Patrolman Sewell recovered the tire irons used in the assault from petitioner and the codefendant at the time of the arrest. The following day, the two defendants were arraigned and released on bond. But before leaving the courthouse, they approached Patrolman Sewell and offered him $1,000 or $1,500 to dispose of the seized weapons. The honest Sewell refused the offer and immediately notified the district attorney of the bribe attempt. At the request of the prosecutor, Sewell later attended a meeting with petitioner to confirm the bribe offer. The relevant narrative skips a year during which petitioner and his codefendant were indicted for attempted assault,

pleaded guilty, and were sentenced to jail. On March 18, 1965, a year after the assault and bribery attempt, petitioner was summoned from jail to appear before a grand jury investigating the possibility of criminal conspiracies in connection with the assault on Graham. The prosecutor, after informing petitioner of the purpose of the investigation, told him that the grand jury was going to vote on whether to give petitioner immunity and explained the meaning of immunity to petitioner as follows:

> "I am going to ask this grand jury to vote on the question of giving you immunity and under Penal Law Section 2447 for the testimony that you will give in this grand jury and that means anything that I ask you and any answers that you give in answer to my questions if it connects you with the crime you cannot be prosecuted for it. That's immunity, do you understand that?" App. 33.

When the grand jury voted to grant immunity, the petitioner said that he would answer the prosecutor's questions, but that he would like to consult his lawyer. The prosecutor refused permission, stating:

> "Under these circumstances you are not a defendant, you are a witness, you have been given immunity. That means you cannot be prosecuted. Your rights are fully protected and there is no reason for your conferring with your attorney, do you understand that?" App. 34.[1]

Petitioner then answered all questions admitting, *inter alia*, that he and his codefendant had been hired to assault and had in fact assaulted Graham; that the tire irons in the possession of the police were the instruments they had

[1] Petitioner has argued that he had a right to counsel in the circumstances of this case. In view of my conclusion that petitioner's conviction is invalid under the Fifth and Fourteenth Amendments, I have no occasion to pass upon his Sixth Amendment argument.

used in the assault; and that they had been surprised in the midst of the assault and had run away but had been caught by the police. The bribery attempt was not mentioned.

Four days later, Patrolman Sewell appeared before the same grand jury and testified about the bribe attempt. Several months thereafter, the grand jury indicted petitioner and his codefendant for offering a bribe. Petitioner moved to dismiss the indictment on the ground that the crime charged involved subject matter for which petitioner had been granted immunity, as required by the Federal Constitution. When the trial court denied the motion, petitioner pleaded guilty. The New York Court of Appeals affirmed the conviction, three judges dissenting. *People* v. *La Bello*, 24 N. Y. 2d 598, 249 N. E. 2d 412 (1969). The New York court interpreted the New York immunity statute to prevent only "the use of the witness' testimony and any evidence derived therefrom." 24 N. Y. 2d, at 604, 249 N. E. 2d, at 416. After holding that this "use" immunity satisfied the requirements of the Fifth Amendment, the New York court affirmed petitioner's conviction based on its findings that "[w]hatever evidence might have been revealed by the appellants' testimony was wholly insubstantial" and that "the indictment was not the product of that testimony." 24 N. Y. 2d, at 605, 249 N. E. 2d, at 416.

Seven months after its decision in petitioner's case, the New York Court of Appeals on December 4, 1969, in a case wholly unrelated to petitioner's, reversed itself on the proper interpretation of the New York immunity statute, holding that the New York statute granted "immunity from prosecution for any crime revealed by a witness' testimony before a Grand Jury." *Gold* v. *Menna*, 25 N. Y. 2d 475, 481, 255 N. E. 2d 235, 238. In a footnote to *Gold*, the New York court stated that

even under its new interpretation, petitioner's conviction was correctly affirmed because he and his codefendant "gave no testimony which related or pertained to the offense for which they were prosecuted and of which they were convicted." 25 N. Y. 2d, at 481 n. 1, 255 N. E. 2d, at 238 n. 1. We granted certiorari, 397 U. S. 933 (1970).

II

The fact that the New York Court of Appeals has reversed itself and changed its interpretation of the New York immunity statute to grant "transactional" immunity, and not merely "use" immunity as that court held when it affirmed petitioner's conviction, provides no basis for dismissing the writ of certiorari as improvidently granted. The state court's interpretation of state law is at best only tangentially related to the federal constitutional question presented in this case. The petitioner here, upon being told "[Y]ou have been given immunity. That means you cannot be prosecuted," proceeded to testify and answer all questions put to him about the Graham assault. Subsequently, he was indicted and convicted for the bribery attempt which arose out of that assault. The New York courts have affirmed petitioner's conviction for bribery, holding that the immunity granted by the state statute did not bar the present conviction. At that point, the relevance to the constitutional question of the scope of immunity afforded by the state court's interpretation of state law ended. The question for this Court is whether the Fifth Amendment, as applied to the States by the Fourteenth Amendment, permits the present conviction to stand in light of the substance of the compelled testimony and the nature and basis of that conviction. That is a matter of federal constitutional law which does not depend upon the interpretation of the New York immunity statute.

The Court's wholly wrong focus upon the particular state immunity statute involved results from its failure to distinguish two different procedural postures in which the question of the scope of immunity required by the Fifth Amendment can be raised. First, an individual may rely on the Fifth Amendment privilege and refuse to answer a question after he has been granted immunity pursuant to an immunity statute and ordered to respond. If he is then held in contempt (or otherwise penalized) for his refusal to answer, the question presented in reviewing the contempt conviction (or other sanction) is whether the statutory grant of immunity is so extensive with the scope of the privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). If the immunity granted is found to be co-extensive with the privilege, then the witness' refusal to answer based on the privilege was unjustified, and the finding of contempt is proper. *Brown* v. *Walker*, 161 U. S. 591 (1896). If, on the other hand, the immunity granted by the statutes falls short of the constitutional requirement, the witness properly relied upon his constitutional privilege, and any sanction imposed cannot stand. *McCarthy* v. *Arndstein*, 266 U. S. 34, 42 (1924). In these cases, analysis therefore necessarily focuses on the particular provisions of the immunity statute in question and on the nuances of its inter-

* If the Court has doubts that petitioner's conviction would still be affirmed in light of the supervening change in the interpretation of state law, the appropriate course would be to remand to the state court for reconsideration, as my Brother BLACK suggests. *Bell* v. *Maryland*, 378 U. S. 226, 228 (1964). The Court's failure to do so presumably rests on the New York court's footnote in its later opinion stating that, in its view, the transactional immunity granted by the New York statute would not affect petitioner's conviction. But if petitioner's conviction is indeed regarded as final under New York law, then the constitutional issue is posed without regard to New York law for the reasons stated in the text.

pretation because there is nothing else before the court. No testimony has yet been compelled, and there has been no subsequent prosecution in any way related to compelled testimony. Most of the cases in which this Court has considered questions of immunity fall into this category,[a] as do the three cases other than the present case cited in the Court's *per curiam* opinion.

The second class of cases, represented by the present one, involves cases in which an individual is granted immunity, proceeds to testify, and is then prosecuted and convicted for an offense related to that testimony. Once the conviction is upheld under the immunity statute, the question in these cases becomes, not whether the statute grants adequate immunity, but rather whether the conviction involved, given the substance of the compelled testimony, falls within the constitutionally required immunity. This decision, of course, must be made on the basis of federal standards under the Fifth Amendment. *Malloy* v. *Hogan*, *supra*.

Since the present case falls into the second group of cases, any uncertainty over the interpretation of the state immunity statute has little bearing on the question whether this Court, having agreed to hear the case, ought to decide the merits. What is relevant is that the pros-

[a] *E. g.*, *Gardner* v. *Broderick*, 392 U. S. 273 (1968); *Uniformed Sanitation Men Assn.* v. *Commissioner of Sanitation*, 392 U. S. 280 (1968); *Malloy* v. *Hogan*, 378 U. S. 1 (1964); *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Ullmann* v. *United States*, 350 U. S. 422 (1956); *Hoffman* v. *United States*, 341 U. S. 479 (1951); *United States* v. *Murdock*, 284 U. S. 141 (1931); *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924); *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922); *Jack* v. *Kansas*, 199 U. S. 372 (1905); *Brown* v. *Walker*, 161 U. S. 591 (1896); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). But *see*, *e. g.*, *Adams* v. *Maryland*, 347 U. S. 179 (1954); *Smith* v. *United States*, 337 U. S. 137 (1949); *Feldman* v. *United States*, 322 U. S. 487 (1944); *Heike* v. *United States*, 227 U. S. 131 (1913).

ent case comes to this Court with a complete factual record raising the constitutional question of the scope of immunity required by the Fifth Amendment privilege. It is worth noting that cases falling in the first class present the court with a bare record, consisting of no more than the text of the immunity statute in question and the witness' refusal to answer a question. Without a factual record, the Court is required to decide "abstract controversy over the use of words." *Regal Knitwear Co.* v. *NLRB*, 324 U. S. 9, 15 (1945), even though the Court has long recognized that important constitutional issues are best decided on the basis of factual records which render the "underlying constitutional issues in clean-cut and concrete form." *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 584 (1947). The absence of such a record is particularly unfortunate in these Fifth Amendment cases because the constitutional issue posed depends upon a judgment as to how broad a protection is necessary to serve the values, purposes, and policies underlying the Fifth Amendment. A factual record showing, for example, the substance of the individual's compelled testimony, the way that testimony was subsequently used by the prosecutor, and the crime for which the individual was ultimately prosecuted, provides important considerations to anchor and inform the constitutional judgment.

Unlike most of the cases in which this Court has considered the scope of immunity required by the Fifth Amendment, the present case offers the Court that factual background.

In the nature of a confession and avoidance, the *per curiam* concedes that the issues "concerning the kind of immunity required by federal law and, if it be 'transactional' rather than 'use' immunity in such a case as this, the proper scope of such immunity" are presented by petitioner's case, but offers three statements in support

of dismissal. First, the Court states that "no controversy any longer exists between the parties as to the question which impelled us to grant the writ: whether, in the circumstances involved in this case, Piccirillo was entitled to 'use' or 'transactional' immunity." As the first sentence of the *per curiam* itself recognizes, the question which impelled us to grant the writ was whether *the Federal Constitution* requires "use" or "transactional" immunity, as those terms have been defined in federal constitutional law. "The parties have always disagreed and continue to disagree over that question," thus the

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"Not only do the parties disagree on the extent of the federal constitutional protection, but both parties also see a decision on that largely disputed question as *necessary* to a decision of the case." Counsel for respondent:

"[I]f transactional immunity is required by the federal Constitution, then the decision of the Court of Appeals that this was or wasn't a thing as specified in the New York state statute, is a matter of federal importance, and it is to be decided by a uniform standard.

"On the other hand, if the only thing that the Constitution requires is a use plus fruits immunity, then when New York decided whether the crime, the bribery was one of the things to be told to the grand jury, becomes strictly a matter of the state interpretation of its own statute, and there is no federal constitutional question involved.

"*And so it is necessary to decide whether transactional immunity is required by the federal Constitution.* Now, the petitioner relies a great deal on the case of Counselman v. Hitchcock. Now, it is our position that Counselman v. Hitchcock is not the law anymore, that it has been overruled, or if it hasn't, it should be . . . ." Tr. of Oral Arg. 24 (emphasis added).

Counsel for petitioner:

"This is the transaction[al] immunity rule that we assert is required under the Fifth Amendment . . . .

"It is our position that this is the rule that first was enunciated in the first case in this Court to deal with the question of immunity and the abrogation of the Fifth Amendment privilege in Counselman

Court's statement that "no controversy may longer exist . . . as to [that] question" is simply contrary to fact.

The Court then suggests that the "agreement between the parties that [petitioner] is entitled to 'transactional' immunity *under state law*" (emphasis added) somehow renders this case an inappropriate one for our decision on the federal constitutional question. The phrase "transactional" immunity is not that a phrase or shorthand symbol. Something labeled "transactional" immunity by a state court may or may not coincide with the constitutional "transactional" immunity defined by decisions of this Court. Indeed, the petitioner vigorously argues that the state immunity granted in this case falls far short of the "transactional" immunity defined by federal constitutional standards. Thus it is fair to describe the "agreement" between the parties to which the Court refers, as merely an agreement that the New York Court of Appeals, in describing the immunity granted by the state statute, used the label "transactional" immunity. Moreover, since the State has finally affirmed petitioner's conviction in this case, the precise formulation of the immunity granted by state law does not, in any event, have any relevance to our consideration of the constitutional validity of petitioner's conviction. The Court makes no reference to what is relevant: the

ss Hitchcock. It has been constantly reiterated in numerous decisions of this Court, and we believe it is a very sound rule.

So we feel that there was no question but that there was a substantial relationship [between the compelled testimony and petitioner's conviction], and that under the transactional immunity test, which we contend is a federal constitutional test, and as it has been explained by this Court in Reina and applied in other cases, the bribery indictment must be found to have been covered by the transactional immunity to which this petitioner was entitled." *Id.*, at 11, 13.

See *supra*, at 333–338.

facts of petitioner's compelled testimony and his present conviction.

Finally, the Court asserts that "our determination upon the fundamental constitutional question underlying this case would be in no sense necessary to its resolution in this instance." This is simply not so. If the Court resolves this case, it must make a "determination upon the fundamental constitutional question." Indeed, the *per curiam* has already conceded that. The issue is why resolution of this case, and hence decision on the constitutional question, is being withheld. In my judgment, the Court has yet to articulate a reason for not deciding this case.

In sum, the Court attempts, none too successfully in my judgment, to create a smokescreen by focusing on questions of state law. Petitioner's conviction, without more, squarely raises the federal constitutional question on a concrete, factual record which provides an excellent basis for constitutional adjudication. Under these circumstances, there exists no basis upon which the Court can justify dismissal of the writ of certiorari as improvidently granted. I therefore turn to the merits.

III

Only one sovereignty, New York State, is involved. Thus the case raises the basic question of the constitutional restrictions upon the power of a state government to prosecute an individual for matters related to incriminating testimony which that State has compelled the individual to give. Unlike, for example, *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964), there is no problem here of limitations imposed on other jurisdictions by New York's act of compelling petitioner to testify against himself. And "where there is only one government involved, be it state or federal, not only is the danger of prosecution more imminent and indeed the likely purpose of the investigation to facilitate prose-

cution and conviction, but that authority has the choice of exchanging immunity for the needed testimony." *Id.*, at 98 (WHITE, J., concurring).

I believe that the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony.[1] Such transactional immunity, in my view, steers a well-conceived middle path between, on the one hand, a position that no immunity statute can supplant the constitutional privilege and, on the other, a position that affords the individual the altogether too narrow protection of use immunity as applied to the very government that has compelled him to incriminate himself. While a position broader than transactional immunity finds some support in the language and history of the Fifth Amendment,[2] the

[1] "Transactional immunity presupposes 'use' immunity (compelled testimony and its fruits cannot be used in any manner . . . in connection with a criminal prosecution against [the witness]." *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 79 (1964).

Historians have noted that the clause itself is absolute and may not originally have been viewed as allowing the government to compel men to incriminate themselves if it only promised not to prosecute them for the crimes revealed:

"The clause by its terms also protected against more than just 'self-incrimination,' a phrase that had never been used in the long history of its origins and development. The 'right against self-incrimination' is a short-hand gloss of modern origin that implies a restriction not in the constitutional clause. The right not to be a witness against oneself imports a principle of wider reach, applicable, at least in criminal cases, to the self-production of any adverse evidence, including evidence that made one the herald of his own infamy, thereby publicly disgracing him.

"The state courts of the framers' generation followed the extension of the right to cover self-infamy as well as self-incrimination, although the self-infamy rule eventually fell into disuse." L. Levy, Origins of the Fifth Amendment 427, 429 (1968).

requirements of today's society and broad governmental economic regulation combined with the existence of the adequate alternative of transactional immunity convince me that the Constitution does not require so sweeping an interpretation as completely to invalidate the immunity technique. Mere use immunity, which protects the individual only against the actual use of his compelled testimony and its fruits, satisfies neither the language of the Constitution itself nor the values, purposes, and policies that the privilege was historically designed to serve and that it must serve in a free country. Finally, this Court's decisions in the course of the past century have consistently read the Constitution as requiring no more, but no less, than transactional immunity.

The Fifth Amendment's guarantee against self-incrimination, "No person . . . shall be compelled in any criminal case to be a witness against himself," has occupied a central place in our jurisprudence since before the Nation's birth:

> "By 1776 the principle of the *nemo tenetur* maxim was simply taken for granted and so deeply accepted that its constitutional expression had the mechanical quality of a ritualistic gesture in favor of a self-evident truth needing no explanation." L. Levy, Origins of the Fifth Amendment 430 (1968).

Not only the Federal Constitution, but every State guarantees the individual the privilege against self-incrimination, all States save two by provision in the state constitution.* This Court has repeatedly emphasized its role as guardian against even inadvertent or gradual erosion of the guarantee. "This provision must have a

* See 8 J. Wigmore, Evidence § 2252 and n. 3 (McNaughton rev. 1961).

broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). The Court's holding that the Fifth Amendment privilege "is also protected by the Fourteenth Amendment against abridgment by the States," *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964), is modern affirmation that the privilege is the "essential mainstay" of the American accusatorial system of criminal prosecution, *id.*, at 7; *Malloy* held that the Fourteenth Amendment applied the privilege's requirements to the States as fully as to the Federal Government.

The words of the Fifth Amendment do not, in terms, suggest that government may compel men to incriminate themselves provided it promises that it will not prosecute them for the crimes revealed. The clause does not prohibit a *prosecution* or *conviction;* it prohibits the application *vel non* of compulsion to an individual to force testimony that incriminates him, regardless of whether he is actually prosecuted. Historically, one of the major evils sought to be allayed by the development of the privilege was the use of torture to extract a confession,[9] not the subsequent use of the confession in a criminal trial. We continue to recognize this distinction; for example, we permit the use of voluntary confessions in criminal prosecutions.[10] Thus we object not so much to convicting a man on the basis of evidence from his own mouth, but rather to the practice of compelling him to incriminate himself, regardless of a subsequent prosecution.

Implicitly, of course, "in any criminal case" suggests a limitation upon the reach of the privilege, although

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[9] See *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896); L. Levy, n. 7, *supra*, at 426 and *passim*.

[10] Talmudic law prohibits the admission in evidence of any self-incriminatory testimony or statement, even if voluntarily given. L. Levy, n. 7, *supra*, at 433–441.

ever since Chief Justice Marshall's opinion in the *Aaron Burr* case; the reach has been the *possibility* of a criminal charge, not whether one is in fact brought. *United States* v. *Burr*, 25 F. Cas. 38 (No. 14692e) (C. C. D. Va. 1807). But if there is no possibility of a criminal case, then the privilege would not apply. And that is precisely the basis on which this Court has consistently upheld grants of immunity from *Brown* v. *Walker*, 161 U. S. 591 (1896), to *Ullmann* v. *United States*, 350 U. S. 422 (1956):

> "[I]f [a man's] testimony operate[s] as a complete pardon for the offence to which it relates a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question." *Brown* v. *Walker*, 161 U. S., at 595.

Or as the Court put it more succinctly 10 years later,

> "if the criminality has already been taken away, the Amendment ceases to apply." *Hale* v. *Henkel*, 201 U. S. 43, 67 (1906).

It is clear, of course, that mere "use" immunity does not "operate as a complete pardon for the offence," nor does it take the criminality away from the testimony in question. If the individual is only promised that the Government will not actually use his compelled testimony or its fruits to convict him, he is still being compelled to testify against himself "in [a] criminal case," in clear contradiction of the constitutional command. He is still being forced by the State to admit criminal conduct for which he may be punished, albeit not on the basis of his compelled testimony.

The policies and purposes which the privilege serves are promoted by the transactional immunity standard. Justice Frankfurter's oft-quoted remark that "[t]he privilege against self-incrimination is a specific provision of which it is peculiarly true that 'a page of history is

worth a volume of logic.'" *Ullmann* v. *United States*, 350 U. S., at 438, reflects the fact that the privilege safeguards many interrelated fundamental values: "It will not do, therefore, to assign one isolated policy to the privilege," *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 56 n. 5, and attempt to argue from "the" policy so identified. In *Murphy*, the Court identified some of the complex of values that the privilege serves:

> "[O]ur unwillingness to subject those suspected of crime to the cruel trilemma of self accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Id.*, at 55 (citations omitted).

I quote this summary of some of the values and purposes served by the privilege at such length because I think it is noteworthy that many, if not most, of them are severely infringed by compelling an individual to testify under any circumstances. I do not seek to reopen the debate of *Brown* v. *Walker*, *supra*, and *Ullmann* v. *United States*, *supra*, whether the Fifth Amendment is compatible with immunity statutes of any nature, not only because *Brown* and *Ullmann* foreclose that inquiry, but also because the competing considerations identified in those

opinions and my Brother WHITE's concurring opinion in *Murphy*, 378 U. S., at 93-96, as well as the language of the Fifth Amendment, convince me that that result is not required. It is, however, important to appreciate the breadth and significance of the values that the Fifth was designed to protect.

In light of those values, it seems clear to me that mere "use" immunity is insufficient when the government involved is the one that has compelled the incriminating testimony. It has been argued that if the State is prohibited from using testimony or information obtained by compulsion, then both the government and the individual are in the same position as if the witness had not testified. As the *Murphy* statement of values shows, from the standpoint of the individual (which is also the standpoint of the Fifth Amendment) that is simply not true. The individual has been compelled to incriminate himself, and if he is granted only use immunity, compelled to do so in matters for which he may ultimately be prosecuted. Even from the standpoint of the State it clearly is not in the same position that it would have been had it not compelled the witness to testify. It has obviously obtained information which may help it to pursue its general investigation, as well as its specific investigation of others. Whether that information will enable the investigation to generate enough steam and continue long enough to produce "independent" evidence incriminating the individual originally compelled to testify is an open question. In short, use immunity literally misses half the point of the privilege, for it permits the compulsion without removing the criminality. *See Hale* v. *Henkel*, *supra*.

Finally, the uncertainties of the factfinding process argue strongly against "use" immunity and in favor of transactional immunity. This Court has recognized that "'[t]here is always in litigation a margin of error, repre-

senting error in factfinding, which both parties must take into account." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). In dealing with a single jurisdiction, we ought to recognize the enormous difficulty in attempting to ascertain whether a subsequent prosecution of an individual, who has previously been compelled to incriminate himself in regard to the offense in question, derives from the compelled testimony or from an "independent source." For one thing, all the relevant evidence will obviously be in the hands of the government—the government whose investigation included compelling the individual involved to incriminate himself. Moreover, this argument does not depend upon assumptions of misconduct or collusion among government officers. It assumes only the normal margin of human fallibility. Men working in the same office or department exchange information without recording carefully how they obtained certain information; it is often impossible to remember in retrospect how or when or from whom information was obtained. By hypothesis, the situation involves one jurisdiction with presumably adequate exchange of information among its various law enforcement officers. Moreover, the possibility of subtle inferences drawn from action or non-action on the part of fellow law enforcement personnel would be difficult if not impossible to prove or disprove. This danger, substantial when a single jurisdiction both compels incriminating testimony and brings a later prosecution, may fade when the jurisdiction bringing the prosecution differs from the jurisdiction that compelled the testimony. Concern over informal and undetected exchange of information is also correspondingly less when two different jurisdictions are involved.

Transactional immunity raises none of these problems. It provides the individual with an assurance that he is not testifying about matters for which he may later be

prosecuted. No question arises of tracing the use or non-use of information gleaned from the witness' compelled testimony. The sole question presented to a court is whether the subsequent prosecution is related to the substance of the compelled testimony. Both witness and government know precisely where they stand. Respect for law is furthered when the individual knows his position and is not left suspicious that a later prosecution was actually the fruit of his compelled testimony.

The transactional immunity standard was first articulated by this Court in *Counselman* v. *Hitchcock*, *supra*, in 1892; it has consistently been reaffirmed and reiterated in both holding and dicta ever since, and has never been seriously questioned in a case involving the actions of a single jurisdiction. In *Counselman*, the Court held that the immunity granted by an 1868 federal statute was inadequate to supplant the right of the witness to rely on his constitutional privilege: "In view of the constitutional provision, a statutory enactment, to be valid, must afford *absolute immunity against future prosecution* for the offence to which the question relates." 142 U. S., at 586 (emphasis added). Four years later, the Court in *Brown* v. *Walker*, *supra*, upheld a contempt conviction for a witness' refusal to answer a question after he had been granted immunity under a new 1893 federal statute enacted after the *Counselman* decision. The 1893 statute provided,

> "[N]o person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify." Act of February 11, 1893, 27 Stat. 443, 49 U. S. C. § 46.

Finding that under this statute a witness' testimony "operate[s] as a . . . pardon" for criminal conduct to which it relates, the Court held that the statute "fully accomplished" the Fifth Amendment objective. 161 U. S., at

610. Only by relying on full transactional immunity did the Court sustain the immunity statute before it over the dissent of four Justices who thought the statute's protection still not coextensive with the constitutional privilege. 161 U. S., at 610-638 (dissenting opinions of Shiras and Field, JJ.).

In *Hale* v. *Henkel*, *supra*, the Court sustained a contempt citation for refusing to answer questions after transactional immunity had been granted under a federal immunity statute, resting on the proposition that "if the criminality has already been taken away, the Amendment ceases to apply." 201 U. S., at 67. In 1924, Mr. Justice Brandeis, speaking for a unanimous Court, held the privilege was available to a bankrupt subpoenaed before a special commissioner for examination

> "because the present statute fails to afford complete immunity from prosecution. If Congress should hereafter conclude that a full disclosure of the bankrupt estate by the witnesses is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer the power of unrestricted examination by providing complete immunity. Compare *Brown* v. *Walker*, 161 U. S. 591; *Glickstein* v. *United States*, 222 U. S. 139, 142; *Ensign* v. *Pennsylvania*, 227 U. S. 592." *McCarthy* v. *Arndstein*, 266 U. S. 34, 42.

See also *United States* v. *Monia*, 317 U. S. 424, 428 (1943) (*Counselman* "indicated clearly that nothing short of absolute immunity would justify compelling the witness to testify if he claimed his privilege"); *Smith* v. *United States*, 337 U. S. 137, 147 (1949) (transactional immunity "met the 'absolute' test of the constitutional provision against self-incrimination").

By 1956, Mr. Justice Frankfurter, writing for the Court, could assert that the 1893 statute, enacted shortly after *Counselman* and adopting the transactional immunity standard, had "become part of our constitutional fabric." *Ullmann* v. *United States*, 350 U. S. 422, 438. Again, the Court in *Ullmann* relied on the transactional immunity standard to reaffirm the holding of *Brown* v. *Walker* against the dissent of two Justices who repeated the arguments of the *Brown* dissenters that even transactional immunity did not satisfy the constitutional privilege. *Ullmann* v. *United States*, *supra*, at 440-455.

Ullmann's assertion that transactional immunity has become part of our "constitutional fabric" finds support in the action of Congress in the 78 years since *Counselman* first announced the standard. Congress has written more than 40 immunity provisions into various federal statutes during that time, and with one minor and unexplained exception in 1898 and two exceptions in 1970,[11] every provision has provided for transactional immunity.[12] Moreover, as reflected by an appendix in petitioner's brief, the majority of state immunity statutes provide for transactional immunity, even though the States were not

[11] 11 U. S. C. § 25 (a)(10). This immunity provision was first enacted in the Bankruptcy Act of July 1, 1898, § 7 (a)(9), 30 Stat. 548, six years after *Counselman*. Professor Wigmore has speculated that the drafters of this provision were hostile to the Bankruptcy Act and purposely drafted an imperfect immunity. 8 J. Wigmore, Evidence § 2283, p. 528-63d ed. 1940). *McCarthy* v. *Arndstein*, 266 U. S. 34 (1924), established that the immunity granted by the section is inadequate to remove the constitutional privilege. Title 18 U. S. C. § 6002 codifies the use immunity provision enacted in the Organized Crime Control Act of 1970, 84 Stat. 927; 21 U. S. C. § 884 codifies the use immunity provision enacted in § 514 (a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1278. (The above codifications will appear in the 1970 edition of the United States Code.)

[12] 8 J. Wigmore, Evidence § 2281, p. 495 n. 11 (McNaughton rev. 1961), and 1970 Supp., p. 51.

subject to the full effect of the Fifth Amendment until 1964. *Malloy* v. *Hogan*, *supra*.

The wisdom of this consistent view of the protection required by the Fifth Amendment is illustrated and supported by the facts of this case. At the time the petitioner was summoned from his prison cell to testify before the grand jury, the prosecutor knew that the petitioner had offered to bribe Patrolman Sewell. He knew that the basis of the bribery was the assault on Graham and that petitioner had sought to influence Sewell to dispose of the two men involved in the assault. Nonetheless, the District Attorney made his decision: he elected to call petitioner before the grand jury which was investigating various conspiracies associated with that assault. Before the grand jury, the prosecutor obtained immunity for petitioner and, under the threat of contempt, compelled the petitioner to testify about the assault and about various matters connected with it. The petitioner complied, relinquishing his constitutionally guaranteed right not to incriminate himself, in the face of a considered decision by a state official to utilize official state processes to compel him to testify.

This Court emphasized in *Brown* v. *Walker*, *supra*, one of the major evils the Amendment was designed to guard against:

> "[I]f an accused person be asked to explain his apparent connection with a crime under investigation, the case with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials . . . made the system so odious as to give rise to a demand for its total abolition. . . . So deeply

> did the majorities of the several states impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law." 161 U. S., at 596, 597

So too in this case, no accused was put in the same position, with the same attendant temptations and pressures upon the prosecutor. That the questioning occurred in the secrecy of the grand jury does not affect the protection afforded the individual by the Constitution. Only if both prosecutor and witness are clearly on notice that questioning about an incident will relieve the witness of all criminal liability substantially related to that subject can we guarantee that the inquisitorial character of the proceeding will be removed, and still allow the prosecutor to seek out facts relevant to the crimes of others.

IV

Under the transactional-immunity standard, I do not believe that petitioner's conviction can stand. Mr. Justice Holmes, in *Heike* v. *United States*, 227 U. S. 131 (1913), in interpreting a federal immunity statute so as to render it "coterminous with what otherwise would have been the privilege of the person concerned," 227 U. S., at 142, held that "[w]hen the statute speaks of testimony concerning a matter it means concerning it in a substantial way." *Id.*, at 144. I agree that immunity attaches only to matters substantially related to the compelled testimony.

Petitioner testified that he had committed the assault on Graham with tire irons. He testified that the tire irons in the possession of the police were the tire irons that he had used. He testified that he was caught immediately after the assault by the police, taken to the station house, booked on the assault charge and released on bail the next day. His testimony carried

right up to the time Patrolman Sewell later testified that petitioner offered him a bribe; it concerned the events and underlying circumstances that gave rise to the bribe. It established the motive for the bribe and established all the facts underlying the substance of the bribe. These are not facts that had "no connection" with the subsequent prosecution, see *Heike* v. *United States*, 227 U. S., at 143–144; to the contrary, they were not merely substantially related to the bribery charge, but actually quite pertinent to that prosecution. Consequently, petitioner's motion to dismiss the indictment should have been granted.

I would reverse the judgment below and remand with instructions to dismiss the indictment.